Supreme Court, U.S.
FILED
2007
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

CORUS STAAL BV,
Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

RICHARD OLAF CUNNINGHAM *
JOEL DENNIS KAUFMAN
ALICE ALEXANDRA KIPEL
WILLIAM GEORGE ISASI
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record

Counsel for Petitioner Corus Staal BV

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether a court reviewing an agency determination that implicates the international obligations of the United States under the World Trade Organization Agreements must remand that determination to the agency because the agency has announced an intervening change in policy affecting that determination.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is Corus Staal BV, a Dutch manufacturer of steel and other products. Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Koninklijke Hoogovens NV (now Corus Nederland BV), which is 100% owned (through its ownership interest in Corus CNBV Investments BV (19%) and Corus Property Ltd. (81%)) by Corus Group plc, a publicly owned company whose shares are listed on the New York, London, and Amsterdam stock exchanges.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
A. Background on Antidumping Proceedings	4
B. Commerce's Intervening Change in Policy	6
C. Implementation Considerations Resulting from the Change in Policy	9
REASONS FOR GRANTING THE PETITION	11
I. THE FAILURE TO REMAND BELOW VIOLATES IN PRINCIPLE A DECISION OF THIS COURT AND CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT	13
A. This Court Has Established the Principle that a Court Reviewing an Agency Determination Following an Intervening Change of Policy Must Remand to the Agency	13
B. Consistent with this Court's Precedent, the Court of Appeals for the District of Columbia Circuit Has Repeatedly Held that a Court Reviewing an Agency Determination Following an Intervening Change of Policy Must Remand to the Agency	14

TABLE OF CONTENTS—Continued

Page

C. The Failure To Remand Below Is in Direct Conflict with the Remand Principle Established by this Court and Followed by the District of Columbia Circuit 16

II. THE FAILURE TO REMAND IS OF GREAT IMPORTANCE BECAUSE IT DIRECTLY IMPLICATES THE UNITED STATES' INTERNATIONAL OBLIGATIONS UNDER THE WTO AGREEMENTS 19

III. THE FAILURE TO REMAND IS OF GREAT IMPORTANCE BECAUSE THE FOOD STORE EMPLOYEES UNION ISSUE IS LIKELY TO RECUR IN VARIOUS AGENCY PROCEEDINGS, IN FUTURE WTO DISPUTES, AND IN A PENDING CASE 23

CONCLUSION 27

APPENDICES

APPENDIX A

Orders of the Federal Circuit

Order Denying Petition for Rehearing and Rehearing *En Banc* 1a

Order Without Opinion Affirming Court of International Trade 2a

APPENDIX B

Opinion of the Court of International Trade 3a

APPENDIX C

Department of Commerce Amended Final Determination 28a

TABLE OF CONTENTS—Continued

Page

APPENDIX D

Department of Commerce Final Determination 35a

APPENDIX E

Statutory Provisions 45a

19 U.S.C. § 3533 ..... 45a

19 U.S.C. § 3538 ..... 49a

APPENDIX F

Corus' Petition for Rehearing *En Banc* Before the the Federal Circuit 54a

APPENDIX G

European Communities' Request for a WTO Panel in Zeroing Dispute 75a

APPENDIX H

U.S. Statements before WTO Dispute Settlement Body Agreeing To Implement *U.S.-Zeroing* 105a

APPENDIX I

Department of Commerce *Federal Register* Notice Announcing Change in Zeroing Methodology 109a

APPENDIX J

Department of Commerce *Federal Register* Notice Confirming Change in Zeroing Methodology 114a

APPENDIX K

Second Written Submission of the United States in Section 129 WTO Challenge 129a

TABLE OF AUTHORITIES

CASES — Page

Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) 21
Corus Staal BV v. U.S. Dep't of Commerce, 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003) 7
Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958) 20
Jilin Henghe Pharm. Co. v. United States, 342 F. Supp. 2d 1301 (Ct. Int'l Trade 2004), *vacated as moot*, 123 Fed. Appx. 402 (Fed. Cir. 2005) 18
Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 15
Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 20
NLRB v. Food Store Employees Union, 417 U.S. 1 (1974) ..... *passim*
Panhandle Eastern Pipe Line Co. v. FERC, 890 F.2d 435 (D.C. Cir. 1989) 14, 17
Thorpe v. Housing Auth., 393 U.S. 268 (1969) 15
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 20
Williston Basin Interstate Pipeline Co. v. FERC, 165 F.3d 54 (D.C. Cir. 1999) 14, 17

FEDERAL STATUTES

19 U.S.C. § 1514(a)&(b) 6
19 U.S.C. § 1516a 3
19 U.S.C. § 1673(1) 4
19 U.S.C. § 1673(2) 4
19 U.S.C. § 1673d(c)(1) 5
19 U.S.C. § 1673d(c)(2) 2, 5, 8
19 U.S.C. § 1673f(b) 6

TABLE OF AUTHORITIES—Continued

	Page
19 U.S.C. § 1673g(a)	5
19 U.S.C. § 1675(a)(1)	5
19 U.S.C. § 1675(a)(2)(C)	4
19 U.S.C. § 1677(35)	4
19 U.S.C. § 1677f-1(d)	8
19 U.S.C. § 3533	2
19 U.S.C. § 3533(g)	9, 19
19 U.S.C. § 3538	2, 9, 19
19 U.S.C. § 3538(c)	9
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1295(a)	26
28 U.S.C. § 1295(a)(5)	12, 25
28 U.S.C. § 1581(c)	3, 25
28 U.S.C. § 1581(h)	25

ADMINISTRATIVE DETERMINATIONS

Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Dep't of Commerce Mar. 6, 2006)	7, 8
Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006)	9, 18
Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 Fed. Reg. 59,565 (Dep't of Commerce Nov. 29, 2001)	11
Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 69 Fed. Reg. 33,630 (Dep't of Commerce June 16, 2004) (final admin. rev.), *as amended by* 69 Fed. Reg. 43,801 (Dep't of Commerce July 22, 2004)	2, 6

TABLE OF AUTHORITIES—Continued

INTERNATIONAL AUTHORITIES — Page

Appellate Body Report, *United States-Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Apr. 18, 2006) 9

Appellate Body Report, *United States-Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007) 8

Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002) 22

Request for the Establishment of a Panel by the European Communities, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/7/Rev.1 (Feb. 19, 2004) 7, 8

Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (Mar. 8, 2002) 10, 18

REGULATIONS

19 C.F.R. § 351.102 5

19 C.F.R. § 351.414(c) 8

OTHER AUTHORITIES

2 *Federal Procedure - Lawyers Edition* § 2:394 (2003) 13

Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* § 12.11 (2d ed. 2001) 20

IN THE

Supreme Court of the United States

No. 06-___

CORUS STAAL BV,

Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Corus Staal BV ("Corus"), respectfully prays that this Honorable Court issue a writ of certiorari to the U.S. Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The judgment of the Court of Appeals was entered without opinion on June 13, 2006 and is reported at 186 Fed. Appx. 997. App. 2a. The order of the court of appeals denying the petition for rehearing and rehearing *en banc* is unreported. App. 1a.

The opinion of the U.S. Court of International Trade is reported at 387 F. Supp. 2d 1291. App. 3a.

The final determination of the U.S. Department of Commerce is reported at 69 Fed. Reg. 33,630 (June 16, 2004) (App. 35a), *as amended* 69 Fed. Reg. 43,801 (July 22, 2004) (App. 28a).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. App. 2a. On September 12, 2006, the court of appeals entered an order denying Corus' timely petition for a rehearing and rehearing *en banc*. App. 1a. On November 30, 2006, the Chief Justice granted Corus' application for an extension of time within which to file a petition for a writ of certiorari to and including January 25, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Tariff Act of 1930, as amended, provides in relevant part: "If the determinations of the administering authority and the Commission under subsections (a)(1) and (b)(1) of this section are affirmative, then the administering authority shall issue an antidumping duty order under section 1673e(a) of this title. If either of such determinations is negative, the investigation shall be terminated upon the publication of notice of that negative determination and the administering authority shall-- (A) terminate the suspension of liquidation under section 1673b(d)(2) of this title, and (B) release any bond or other security, and refund any cash deposit, required under section 1673b(d)(1)(B) of this title. 19 U.S.C. § 1673d(c)(2).

The relevant provisions of the Uruguay Round Agreements Act, 19 U.S.C. §§ 3533 and 3538, are reproduced at App., *infra*, 45a.

STATEMENT

This case presents an important question of administrative law with significant implications for the United States'

international obligations under the World Trade Organization ("WTO") Agreements. Under established precedent of this Court, a reviewing court must remand an agency determination when an agency announces an intervening change of policy. *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 & n.10 (1974). This remand is necessary so that the agency can determine, in the first instance, whether the change in policy applies to the agency determination under judicial review.

The U.S. Court of Appeals for the Federal Circuit ignored this rule.[1] Instead, despite an intervening change in policy announced by the U.S. Department of Commerce ("Commerce") on an issue likely dispositive of the pending appeal, the Federal Circuit decided without opinion that a remand of an antidumping decision was not warranted. This refusal to remand has limited the implementation of this change in policy by effectively precluding the change in policy from affecting the Commerce decision under review.

The consequences of the Federal Circuit's refusal to remand are serious and require this Court to grant this petition. First, Commerce announced the change in policy in order to bring the United States into conformity with its international obligations under the WTO Agreements. The Federal Circuit's failure to remand limits Commerce's ability to implement the change in policy and thereby contradicts the congressionally-mandated implementation process for adverse WTO reports, which places the responsibility for implementation of such reports with the Executive Branch in consultation with Congress. In addition, because the antidumping proceeding undergoing Federal Circuit review and the announced change in policy directly implicate the United States' international obligations under the WTO Agreements,

---

[1] The appeal to the Federal Circuit followed review by the Court of International Trade pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c).

the Federal Circuit's failure to remand violates constitutional separation of powers considerations, which recognize the sole competency of the Executive Branch in conducting the foreign affairs of the United States. Finally, the issue presented here is likely to arise in various agency proceedings, in future WTO disputes, and in at least one case pending before the Federal Circuit.

A. Background on Antidumping Proceedings

The Petitioner, Corus, is a Dutch steel producer. Certain of Corus' exports of steel to the United States have been subject to antidumping duties for more than five years pursuant to an antidumping determination that the WTO recently ruled violated the United States' international trade obligations.

"Dumping" refers to the sale of foreign goods at less than fair value. Generally, dumping is determined by comparing the price of the imported good in the United States to the price of the good in the home market. The lower the U.S. price is in relation to the home market price, the greater the dumping margin.[2] Under U.S. law, foreign producers or exporters who sell dumped products in the United States may be subject to antidumping duties. The agency responsible for determining whether dumping is occurring, as well as establishing the level of antidumping duties to apply to imports, is Commerce. 19 U.S.C. §§ 1673(1) & 1675(a)(2)(C). In addition to a dumping determination, U.S. law requires a finding that imports cause injury (or threaten to cause injury) to a U.S. industry before antidumping duties may be imposed. 19 U.S.C. § 1673(2). The agency responsible for making injury determinations is the U.S. International Trade Commission ("the Commission"). 19 U.S.C. § 1673(2).

---

[2] *See* 19 U.S.C. § 1677(35) (defining a dumping margin as a comparison between "normal value" (home market price) and export price or constructed export price (U.S. price)).

Commerce administers the antidumping law through antidumping "proceedings." 19 C.F.R. § 351.102. These proceedings are divided into several "segments." *Id.* The first segment is an antidumping investigation where Commerce determines if dumping is occurring. If Commerce makes an affirmative dumping determination and the Commission makes an affirmative injury determination, Commerce issues an antidumping order on the dumped product. 19 U.S.C. § 1673d(c)(1). If Commerce makes a negative dumping determination, *e.g.*, determines that goods have been sold at fair value, or the Commission makes a negative injury determination, then no dumping order issues and the antidumping proceeding is terminated. 19 U.S.C. § 1673d(c)(2).

U.S. law further provides that, in a separate segment of the antidumping proceeding, through "administrative reviews," antidumping orders may be reviewed on an annual basis. 19 U.S.C. § 1675(a)(1). During the review process, Commerce examines the sales from the "period of review" (*e.g.*, the prior twelve months) to determine the level of dumping for that period. The final rate of antidumping duties for goods that entered the United States during the period of review is based on the results of the administrative review. 19 U.S.C. § 1675(a)(2)(C). If Commerce does not find dumping during the review, the final rate is zero and no antidumping duties are collected.

Antidumping duties are assessed on dumped imports through a cash deposit system. As imports subject to an antidumping order enter the United States, the importer posts cash deposits based on the level of dumping established in the most recently completed administrative review in the antidumping proceeding. 19 U.S.C. § 1673g(a). These cash deposits are held by U.S. Customs and Border Protection ("Customs") until Commerce completes the administrative review for the period of review in which the imports entered the United States. Once the administrative review is com-

pleted, the duties are "liquidated," or finally assessed, based on the results of the administrative review. 19 U.S.C. § 1675(a)(2)(C). If the liquidated duties are greater than the cash deposits, additional duties plus interest are assessed on the importer. 19 U.S.C. § 1673f(b). If the liquidated duties are less than the cash deposits, duties are refunded to the importer with interest. *Id.* Liquidation is largely a final act that cannot be reversed. 19 U.S.C. § 1514(a)&(b). Thus, the U.S. Court of International Trade routinely grants preliminary injunctions in order to prevent liquidation during the pendency of litigation arising from the antidumping proceeding. Once the litigation is concluded and the preliminary injunction is lifted, liquidation occurs based on the results of the litigation.

B. Commerce's Intervening Change in Policy

This case arises out of the first administrative review[3] within the antidumping proceeding on hot rolled steel from the Netherlands ("Dutch Steel Antidumping Proceeding"). Corus challenged the first administrative review results before the Court of International Trade (App. 3a) and the Federal Circuit (App. 2a), arguing that application of antidumping duties to its steel products was contrary to U.S. law. Both courts rejected Corus' arguments and affirmed Commerce's results. *Id.*

After briefing, but before the Federal Circuit entered judgment without opinion, Commerce announced an important change in policy for antidumping proceedings. Commerce announced that it was abandoning its long-standing

---

[3] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 33,630 (Dep't of Commerce June 16, 2004) (final admin. rev.) (App. 35a), *as amended by* 69 Fed. Reg. 43,801 (Dep't of Commerce July 22, 2004) (am. final admin. rev.) (App. 28a).

policy of "zeroing" in antidumping investigations.[4] Moreover, as described below, Commerce also agreed to implement this change in policy in the Dutch Steel Antidumping Proceeding.

Under the zeroing policy, Commerce does not give full effect to sales made at fair value. Rather, the difference between normal value and the U.S. price is set to zero when the U.S. price is at or above fair value. Commerce employed this policy in the vast majority of antidumping investigations, including the Dutch Steel Antidumping Investigation. It is uncontested that, if Commerce had not employed zeroing, Commerce would have made a negative dumping determination in the Dutch Steel Antidumping Proceeding.[5] That is, Commerce was able to make an affirmative dumping determination in the Dutch Steel Antidumping Proceeding only because it did not give full effect to Corus' sales made at or above fair value. Without an affirmative dumping determination, Commerce has no legal authority to impose an antidumping order or conduct administrative reviews and

---

[4] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't of Commerce Mar. 6, 2006). App. 109a.

[5] *See* Request for the Establishment of a Panel by the European Communities, *United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/7/Rev.1 (Feb. 19, 2004) ("Zeroing Panel Request"). App. 75a. In this request, the European Communities identified those antidumping proceedings for which Commerce would not have calculated a dumping margin (*i.e.*, Commerce would have "calculated a negative margin") but for zeroing. Included among the identified proceedings is the Dutch Steel Antidumping Proceeding. Zeroing Panel Request, WT/DS294/7/Rev.1, at 7 ("Specific Case No. 1"). App. 84a. The United States has not disputed that, without zeroing, the Dutch Steel Antidumping Investigation determination would have been negative. *See, e.g., Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1260 & n.8 (Ct. Int'l Trade 2003).

Commerce must terminate the antidumping proceeding. 19 U.S.C. § 1673d(c)(2). Thus, as a result of the change in zeroing policy, the legal basis for the Dutch Steel Antidumping Proceeding—including the administrative review upon which this petition is based—now must be reexamined by Commerce.

Commerce announced the abandonment of zeroing[6] in response to a challenge to zeroing brought against the United States under the WTO Agreements ("*U.S.-Zeroing*").[7] This WTO dispute included both a facial challenge (referred to in WTO litigation as an "as such" challenge) and as applied challenges to zeroing in fifteen antidumping investigations and sixteen administrative reviews. Included among the as applied challenges was the Dutch Steel Antidumping Investigation. App. 84a. As a result of the dispute, the WTO's highest decisional body, the WTO Appellate Body, ruled zeroing to be a violation of the United States' obligations under the WTO Agreements both on an as such basis in antidumping investigations and as applied in the

---

[6] Specifically, Commerce announced that it would no longer utilize zeroing in average-to-average price comparisons conducted during antidumping investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. at 11,189. App. 109a. U.S. law provides Commerce with additional comparison methodologies (*e.g.*, transaction-to-transaction comparisons). 19 U.S.C. § 1677f-1(d). These other comparison methodologies are not relevant to the instant case because they are only used in unusual circumstances which Commerce has not found in the Dutch Steel Antidumping Proceeding. *See* 19 C.F.R. § 351.414(c). Additionally, to the extent that Commerce would consider employing an alternative comparison methodology in implementing *U.S.-Zeroing*, Commerce could not zero because the WTO Appellate Body has ruled zeroing under alternative comparison methodologies to be a facial (or "as such") violation of the WTO Agreements. Appellate Body Report, *United States-Measures Relating to Zeroing and Sunset Reviews*, ¶ 190, WT/DS322/ AB/R (Jan. 9, 2007).

[7] Zeroing Panel Request, WT/DS294/7/Rev.1. App. 75a.

challenged antidumping investigations and administrative reviews.[8] On May 30, 2006, the United States formally announced to the WTO that it would implement fully the *U.S.-Zeroing* WTO Report. App. 105a.

C. Implementation Considerations Resulting from the Change in Policy

Changes in policy made in order to implement WTO reports are governed by Section 123 of the Uruguay Round Agreements Act.[9] Commerce announced its abandonment of zeroing under this statutory provision.[10] Redeterminations of Commerce antidumping decisions in response to as applied WTO challenges are governed, in part, by Section 129 of the Uruguay Round Agreements Act. 19 U.S.C. § 3538. App. 49a. In implementing *U.S.-Zeroing*, Commerce will have to make Section 129 determinations for each of the challenged antidumping investigations and administrative reviews, including the Dutch Steel Antidumping Investigation.

Section 129 determinations apply to goods that enter the United States on or after the date on which the U.S. Trade Representative ("USTR") directs Commerce to implement the Section 129 determination. 19 U.S.C. § 3538(c). App. 52a. No provision of U.S. law speaks directly to how the United States should implement WTO decisions as to goods that

---

[8] Appellate Body Report, *United States-Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006).

[9] 19 U.S.C. § 3533(g). App. 47a. The Uruguay Round Agreements Act gives legal effect to the WTO Agreements under U.S. law.

[10] App. 109a. Commerce recently published in the *Federal Register* a final notice under Section 123 of the Uruguay Round Agreements Act confirming that it has abandoned its zeroing policy. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006) (final modification). App. 114a.

enter the United States prior to USTR authorization. Thus, in implementing a WTO report, one important issue that Commerce must decide is how such an implementation will affect goods that have previously entered the United States but remain unliquidated. This is particularly the case when the new WTO-consistent policy will result in the revocation of an antidumping order. In such an instance, Commerce would have to determine how revocation of the order would apply to previously entered but unliquidated entries. In a WTO challenge that analyzed the Section 129 implementation process, the United States expressly recognized the need for Commerce to undertake such an analysis:

> The second scenario . . . is a situation where the WTO challenge results in the revocation of antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce *would need to decide* what to do with respect to entries that took place prior to the date of revocation.[11]

In agreeing to implement the *U.S.-Zeroing* WTO Report, the United States has agreed, *inter alia*, to abandon its zeroing policy in all future antidumping investigations and apply that abandonment in the challenged antidumping investigations, including the investigation on which the Dutch Steel Antidumping Proceeding is premised. As described above, one of the important decisions Commerce will have to make in implementing *U.S.-Zeroing* in the Dutch Steel Antidumping

---

[11] Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶ 19, WT/DS221 (Mar. 8, 2002) (emphasis added). App. 139a-140a.

Proceeding is how that implementation will affect previously entered but unliquidated entries covered by the Dutch Steel Antidumping Order,[12] including those entries covered by the administrative review underlying this certiorari petition. Furthermore, it is uncontested that Commerce made an affirmative dumping determination in the Dutch Steel Antidumping Investigation only as a result of its zeroing policy. *See* discussion *supra* pp. 7-8 & n.5. Thus, in making its Section 129 determination, Commerce will have to revoke the Dutch Steel Antidumping Order and terminate the antidumping proceeding. Consistent with the United States' representations to the WTO in the Section 129 dispute quoted above, this revocation will require Commerce to determine "what to do with respect to entries that took place prior to the date of revocation" of the Dutch Steel Antidumping Order. *See* quotation *supra* p. 10. Included within this decision will be what to do with entries covered by the administrative review upon which this certiorari petition is based.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's refusal to remand the first administrative review of the Dutch Steel Antidumping Proceeding violates clear precedent of this Court, which requires a reviewing court to remand following an intervening change in policy in order that the agency may determine, in the first instance, whether the change in policy will apply to the administrative decision undergoing judicial review. *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 10 & n.10 (1974). This precedent has been followed by the U.S. Court of Appeals for the D.C. Circuit on numerous occasions.

---

[12] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't of Commerce Nov. 29, 2001) (antidumping order) ("Dutch Steel Antidumping Order").

In addition, as a result of the Federal Circuit's refusal to remand, Commerce's ability to implement the change in zeroing policy has been limited because the Federal Circuit effectively precluded the change in policy from affecting the first administrative review of the Dutch Steel Antidumping Order.

The violation of this Court's precedent and resulting limitation on the implementation of the change in zeroing policy is serious and it is important for this Court to grant this petition for several reasons. First, the Federal Circuit's failure to remand violates the congressionally-mandated implementation process for adverse WTO reports which recognizes the Executive Branch in consultation with Congress as being responsible for implementation of adverse WTO reports. Second, the Federal Circuit's failure to remand violates constitutional separation of powers considerations that recognize the sole competency of the Executive Branch to conduct the foreign affairs of the United States. Finally, the issue raised here is likely to occur in various agency proceedings, in future WTO disputes, and in at least one pending case.

Furthermore, the Federal Circuit's exclusive appellate jurisdiction over international trade disputes, 28 U.S.C. § 1295(a)(5), ensures that the issues raised in this case will not be further vetted in the other federal judicial circuits. Accordingly, this Court is the only forum available to correct the fundamental departure from this Court's precedent embodied in the Federal Circuit's order.

I. THE FAILURE TO REMAND BELOW VIOLATES IN PRINCIPLE A DECISION OF THIS COURT AND CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

A. This Court Has Established the Principle that a Court Reviewing an Agency Determination Following an Intervening Change of Policy Must Remand to the Agency

In *Food Store Employees Union*, this Court reversed a court of appeals decision that amended an NLRB order to include an award of litigation expenses. 417 U.S. at 11. Prior to *Food Store Employees Union*, the NLRB had a policy of excluding these expenses from its orders. However, during the pendency of the litigation, the NLRB issued an opinion changing the policy to favor inclusion. Because of this intervening change in policy, the court of appeals ordered these expenses included in the order. This Court reversed the court of appeals, finding that:

> a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.

417 U.S. at 10 n.10; *accord* 2 *Federal Procedure—Lawyers Edition* § 2:394 (2003) ("[c]hange in agency rule").

B. Consistent with this Court's Precedent, the Court of Appeals for the District of Columbia Circuit Has Repeatedly Held that a Court Reviewing an Agency Determination Following an Intervening Change of Policy Must Remand to the Agency

The U.S. Court of Appeals for the District of Columbia Circuit has repeatedly followed the principle enunciated in *Food Store Employees Union.* For example, in *Williston Basin Interstate Pipeline Company v. FERC* ("*Williston Basin*"), the D.C. Circuit remanded a determination to the Federal Energy Regulatory Commission ("FERC") because the agency announced a change in policy. 165 F.3d 54, 62-63 (D.C. Cir. 1999). During the pendency of the *Williston Basin* litigation, the FERC issued a determination in which it changed its policy for evaluating the rate of return on common equity to weigh short-term data more heavily. *Id.* at 61-62. The D.C. Circuit held that the case had to be remanded to the FERC in order for the agency to determine whether the appellant's rate of return on common equity should be recalculated consistent with the new policy. *Id.* at 62-63.

Similarly, in *Panhandle Eastern Pipe Line Co. v. FERC*, the D.C. Circuit remanded a FERC determination due to an intervening change in policy. 890 F.2d 435, 439 (D.C. Cir. 1989). In that determination, the FERC denied certain proposed tariff sheets that required customer orders for the transportation of natural gas to be carried out through a second pipeline company. In order to transfer those orders to the second pipeline company, the tariff sheet filer proposed assigning to its customers its entitlement to transportation services provided by the second pipeline company. The FERC rejected the proposed tariff sheets, ruling, *inter alia*, that assigning entitlements to transportation services (*i.e.*, "capacity brokering") was not allowed under established FERC policy. *Id.* at 438. The D.C. Circuit remanded the

FERC determination because, following the issuance of the determination, the FERC announced a change in policy that allowed for capacity brokering in individual cases and, at times, even encouraged such brokering. In explaining the basis for the remand, the D.C. Circuit cited this Court's decision in *Food Store Employees Union* and explained that a remand was appropriate following an intervening change in policy because:

> [s]uch a disposition represents the intersection of two well-established doctrines. The first holds that an appellate court must consider the law in effect at the time it renders its decision, even when a change in governing law is made by an administrative agency. *See Thorpe v. Housing Auth.*, 393 U.S. 268, 281 . . . (1969). The second holds that a reviewing court may 'not supply a reasoned basis for the agency's action that the agency itself has not given.' *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 . . . (1983). Thus, because we are at liberty neither to evaluate the [FERC]'s decision under [its] *old* policy on capacity brokering nor to assess on our own how Panhandle's tariffs would fare under FERC's *new* policy, we are required to remand so that the [FERC] may indicate how, if at all, its decision would be affected by its intervening policy change.[10]
>
> [10]The [FERC] will need to determine, for example, 'whether giving the change retrospective effect will best effectuate the policies underlying' the pertinent regulations, *Food Store Employees Union*, 417 U.S. at 10 n.10 . . . and if so, how [its] new policy applies to Panhandle's tariffs.

Id. at 438-39 & n.10 (footnote omitted).

C. The Failure To Remand Below Is in Direct Conflict with the Remand Principle Established by this Court and Followed by the District of Columbia Circuit

Both Commerce and USTR have stated in unequivocal terms that Commerce will no longer employ in antidumping investigations an average-to-average price comparison with zeroing. *See* discussion *supra* pp. 9-10. This change in policy occurred during the pendency of the Federal Circuit litigation (*i.e.*, after briefing, before the Federal Circuit issued its judgment without opinion affirming the Court of International Trade decision and before Corus' motion for reconsideration). It is undisputed that Commerce employed this abandoned zeroing methodology in the Dutch Steel Antidumping Proceeding, the first administrative review of which the Federal Circuit was examining below. It also is undisputed that a non-zeroed computation in the investigation of Corus' sales would have resulted in a determination that Corus was *not* dumping, thus precluding Commerce from issuing the antidumping order upon which the appealed administrative review relies for authority. Finally, the United States has given a commitment to the WTO Dispute Settlement Body that it will implement the zeroing WTO Report in the Dutch Steel Antidumping Proceeding. This WTO Report requires the United States to refrain from zeroing when re-determining dumping in the Dutch Steel Antidumping Proceeding. Thus, as Corus argued in its petition for rehearing (App. 54a), it was incumbent upon the Federal Circuit to remand this case to Commerce under the principle enunciated in *Food Store Employees Union.*

The Federal Circuit's refusal to remand is in direct conflict with the *Food Store Employees Union* remand rule. This Court explained that a remand following an intervening change in policy is necessary to allow the agency to determine in the first instance the extent to which the change in

policy should be given retrospective effect. *Food Store Employees Union*, 417 U.S. at 10 & n.10; *see also Panhandle Eastern Pipe Line Co.*, 890 F.2d at 439 & n.10; *Williston Basin*, 165 F.3d at 63. The "retrospective effect" to which this Court referred was whether the NLRB's change in policy should apply to an agency determination completed before the change in policy and undergoing judicial review. In the instant case, the Government must answer a similar question. The Government must determine how its change in zeroing policy should affect the legal basis for an administrative review determination that is undergoing judicial review.

As a result of the *U.S.-Zeroing* WTO dispute, the United States has agreed to implement a new comparison methodology for all future antidumping investigations as well as in the fifteen challenged antidumping investigations, including the investigation of Corus' imports. It is uncontested that, but for the abandoned zeroing methodology, Commerce would have made a negative dumping determination in the Dutch Steel Antidumping Investigation. *See* discussion *supra* pp. 7-8 & n.5. Thus, in the Dutch Steel Antidumping Proceeding, Commerce was able to make an affirmative dumping determination and impose an antidumping order—the same order under which Commerce conducted the appealed administrative review—only by using the methodology that is the subject of the policy change.

This case therefore presents even more conclusive facts than did *Food Store Employees Union* or the D.C. Circuit cases cited above for the principle that a court, faced with an intervening change in policy by the agency, must remand to permit the agency to decide in the first instance issues related to the application of the changed policy to cases undergoing judicial review. Here, the agency has announced the abandonment of the zeroing methodology without which it would have been unable to issue the antidumping order that provided the legal authority for the appealed review. App.

109a. The abandonment of the methodology was unequivocally reconfirmed nine months later. App. 114a. Moreover, the United States has resolved the issue of whether that methodological change will apply to the investigation that justified the antidumping order in this case. It did so by committing to the WTO to implement *in the instant antidumping proceeding* the abandonment of the zeroing methodology condemned in *U.S.-Zeroing*.[13]

There remain, of course, issues that the agency must address. With the computation method that supported issuance of the order now abandoned, is there any other basis on which the validity of the order can be maintained? If the order was invalidly issued, does this remove the basis on which the reviews of that order—such as the review on appeal—can be properly conducted? *Jilin Henghe Pharm. Co. v. United States*, 342 F. Supp. 2d 1301, 1309-10 (Ct. Int'l Trade 2004) (once Commerce's dumping determination is invalidated, it cannot serve as a legal basis for imposition of antidumping duties), *vacated as moot*, 123 Fed. Appx. 402 (Fed. Cir. 2005). As to the latter question, the Court should note that the United States has given specific assurance to the WTO that, where an order is revoked in implementation of a WTO report, "Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation."[14] The remand that is required by the rule of *Food Store Employees Union* is therefore to permit the agency to consider fully the implementation issues which

---

[13] Commerce recently has confirmed that the change in policy will be applied to this proceeding. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation*, 71 Fed. Reg. 77,722, 77,725 (Dep't of Commerce Dec. 27, 2006) (final modification). App. 114a.

[14] Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶ 19, WT/DS221 (Mar. 8, 2002). App. 140a.

arise from the implementation course it has already set—namely, to apply its change in policy to the antidumping proceeding of which the appealed decision was the first administrative review. The issues that remain unresolved—issues relating to the effect of that retrospective application of the changed policy to the validity of the antidumping proceeding, including the validity of the appealed review—are quintessentially the type of issues that both this Court and the D.C. Circuit have held must be decided by the agency and that require a remand.

Thus, for all these reasons, the only proper course is for this case to be remanded so that the Executive Branch may determine in the first instance the extent to which the zeroing change in policy should affect cases under on-going judicial review, including the case underlying the instant certiorari petition.

II. THE FAILURE TO REMAND IS OF GREAT IMPORTANCE BECAUSE IT DIRECTLY IMPLICATES THE UNITED STATES' INTERNATIONAL OBLIGATIONS UNDER THE WTO AGREEMENTS

As discussed above, the United States has obligated itself to implement the *U.S.-Zeroing* WTO decision in the Dutch Steel Antidumping Proceeding which underlies the instant certiorari petition. *See* discussion *supra* pp. 10-11. Where a court is reviewing an administrative proceeding in which the United States has obligated itself internationally, it is particularly important for the reviewing court to remand to the agency. First, such a remand is consistent with the congressionally-mandated implementation regime for adverse WTO reports. This statutory regime places the responsibility for implementation squarely in the Executive Branch (*i.e.*, USTR and Commerce). 19 U.S.C. §§ 3533(g) & 3538. Apps. 47a & 49a. Second, such a remand comports with the

constitutional separation of powers which recognizes the sole competency of the Executive Branch in conducting the foreign affairs of the United States. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). A remand would allow the Executive Branch to evaluate fully the implementation as it relates to the United States' international obligations, thus minimizing the likelihood that the United States will act contrary to these obligations. In this way, such a remand also is consistent with the responsibility of the Federal Judiciary in minimizing conflicts between the law of the United States and the United States' international obligations. *Cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains").

Finally, such a remand also comports with general principles of administrative law which recognize the importance of allowing agencies primary jurisdiction to determine how to conduct agency proceedings. As this Court has recognized, allowing agencies the discretion to consider, in the first instance, how to conduct an agency proceeding is necessary given that "practical considerations dictate a division of functions between court and agency. . . ." *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498 (1958). Allowing agencies primary jurisdiction facilitates the conduct of the agencies' congressionally-mandated responsibility in maintaining uniform regulatory schemes and also permits the government to take full advantage of the specialized knowledge of these agencies with respect to matters within their fields. Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* § 12.11 (2d ed. 2001).

The Federal Circuit has expressly recognized the importance of allowing the Executive Branch to take the primary

role in implementing adverse WTO reports without interference from the Judiciary. The Federal Circuit has stated:

> Congress . . . has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement the [WTO] reports and determinations and, if so implemented, the extent of implementation.
>
> * * * *
>
> * * * We will not attempt to perform duties that fall within the exclusive province of the political branches . . . .

Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1349 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006). In failing to remand in the case below, the Federal Circuit violated these principles, effectively deciding that implementation of *U.S.-Zeroing* would not reach the goods covered by the first administrative review of the Dutch Steel Antidumping Order. Specifically, a remand is necessary in order for the Government to include the first administrative review of the Dutch Steel Antidumping Order in the implementation of *U.S.-Zeroing*. For the reasons discussed above, such a limitation on the Executive Branch's implementation of the United States' international obligations is impermissible under the Uruguay Round Agreements Act, constitutional separation of powers principles, and general administrative law principles, and must be corrected by this Court.

Given the direct impact on the United States' international obligations under the WTO Agreements, the importance of remanding in the instant proceeding is manifest. However, there are implementation issues specific to this case which make granting the petition for certiorari even more crucial. Specifically, it is uncontested that implementation of *U.S.-Zeroing* will result in a negative dumping determination, thus invalidating the Dutch Steel Antidumping Order and requiring termination of the Dutch Steel Antidumping Pro-

ceeding. *See* discussion *supra* pp. 7-8 & n.5. The issues inherent to revoking an antidumping order in response to an adverse WTO report, particularly whether such a revocation will reach previously entered but unliquidated entries, have never been resolved by the Executive Branch.

Moreover, there can be no question that these revocation issues are highly controversial under the WTO Agreements. In 2001, Canada challenged the United States' legal regime for implementation of adverse WTO reports, arguing that it was WTO-inconsistent because, *inter alia*, it would not allow the Executive Branch to reach previously entered but unliquidated entries when revoking an antidumping order. The United States argued before the WTO panel that the implementation regime did not preclude a revocation from affecting previously entered but unliquidated entries and that, instead, the Executive Branch would have to determine in individual cases how the revocation would affect such entries. *See* discussion *supra* p. 10.

Based largely on this argument, the WTO panel ruled that the U.S. implementation regime was WTO-consistent.[15] Thus, there can be no question that the implementation issues inherent in *U.S.-Zeroing* directly implicate controversial issues under the WTO Agreements and necessitate a remand.

Furthermore, when the Federal Circuit's limitation on the United States' implementation is considered in light of the WTO report in the challenge to Section 129, it is evident that the Federal Circuit could be, in effect, causing the United States to violate its international obligations. That is, if the United States is unable to reach previously entered but unliquidated entries in implementing *U.S.-Zeroing*, the United States may be in violation of its international obligations under the WTO Agreements. A remand would enable Com-

---

[15] Panel Report, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶¶ 6.82 & 6.83, WT/DS221/R (July 15, 2002).

merce to prevent this result because it would ensure that the Executive Branch has available the full range of options when deciding how to implement *U.S.-Zeroing*.

III. THE FAILURE TO REMAND IS OF GREAT IMPORTANCE BECAUSE THE *FOOD STORE EMPLOYEES UNION* ISSUE IS LIKELY TO RECUR IN VARIOUS AGENCY PROCEEDINGS, IN FUTURE WTO DISPUTES, AND IN A PENDING CASE

As explained above, the *Food Store Employees Union* rule requires a remand when an agency announces an intervening change in policy and that policy was applied in an administrative determination undergoing judicial review. *See* discussion *supra* p. 13. The remand is required in order to determine the extent to which the change in policy should affect the administrative determination undergoing judicial review. Because of the structure of the administrative proceeding underlying this certiorari petition, the need to remand herein is particularly acute. The need for a remand will also present itself in future WTO antidumping and countervailing duty disputes. Finally, this issue is likely to arise in various administrative proceedings that the Federal Circuit reviews and in at least one additional case undergoing Federal Circuit review. Because this issue is likely to arise in an ongoing case and future cases before the Federal Circuit, it is particularly important for this Court to grant the instant certiorari petition.

Antidumping proceedings are made of up of a three-step sequential process: agency investigation, issuance of an agency order, and agency action pursuant to the order. *See* discussion *supra* p. 5. Each of these steps is dependent on the completion of the prior step. Once an agency announces a change of policy that is to be applied to a prior step, the agency must decide whether this change in policy will affect

the subsequent steps in the administrative proceeding. Thus, as Commerce has announced a change in policy in the first step in the instant agency proceeding (*i.e.*, the Dutch Steel Antidumping Investigation), Commerce must decide whether this change will affect subsequent steps in the proceeding, including the Dutch Steel Antidumping Order and the administrative reviews under that order.

The need for such a remand is additionally required in the instant case because it is uncontested that the announced change in policy will result in a negative dumping determination, thus invalidating the second step of the agency proceeding (*i.e.*, invalidating the Dutch Steel Antidumping Order) and requiring termination of the Dutch Steel Antidumping Proceeding. *See* discussion *supra* pp. 7-8 & n.5. An agency remand is needed, therefore, in order to determine whether any future agency action (*e.g.*, assessment of antidumping duties) may be taken pursuant to the invalidated Dutch Steel Antidumping Order.

This three-step process is found in all antidumping and countervailing duty proceedings. Thus, the need for a remand is likely to occur in future WTO disputes involving antidumping and countervailing duty proceedings.[16] Whenever, as in the instant appeal, an antidumping or countervailing duty WTO dispute results in a change in policy that is to be

---

[16] Countervailing duty proceedings are conducted to determine whether foreign producers exporting goods to the United States have benefited from improper subsidization by a foreign government. Countervailing duty proceedings have the same structure as antidumping proceedings (*e.g.*, investigation, order and administrative reviews). Thus, WTO disputes involving countervailing duty proceedings may present implementation issues very similar to those present in the Dutch Steel Antidumping Proceeding (*i.e.*, whether revocation of a countervailing duty order would affect administrative reviews undergoing judicial review) and similarly would require a remand pursuant to *Food Store Employees Union*.

applied to one of the prior steps in the agency proceeding (*e.g.*, an antidumping investigation), the *Food Store Employees Union* rule requires a remand to determine whether this change in policy will affect subsequent parts of the administrative proceeding. Moreover, the likelihood of such a recurrence is great in light of the fact that a clear majority of WTO disputes involve antidumping and countervailing proceedings.

Furthermore, it is not just in Federal Circuit appeals involving Commerce determinations in which the *Food Store Employees Union* rule can be implicated. For example, the Federal Circuit reviews Commission injury determinations in antidumping proceedings.[17] If the Commission were to announce a change in policy as to injury investigations, the *Food Store Employees Union* rule would require a remand if a court were reviewing agency action taken pursuant to the prior policy. Similarly, the Federal Circuit reviews Customs' determinations, such as customs rulings which determine under what tariff classification and at what rate a good should enter the United States.[18] If, for example, Customs were to change its policy for determining tariff classification, the *Food Store Employees Union* rule would require a remand if a court were reviewing agency action taken pursuant to the prior policy. The Federal Circuit also hears numerous other appeals involving agency action and agency policies and its

---

[17] 28 U.S.C. § 1295(a)(5) (the Federal Circuit has exclusive jurisdiction of an appeal from a final decision of the Court of International Trade); *see also* 28 U.S.C. § 1581(c) (stating that the Court of International Trade has exclusive jurisdiction over civil actions commenced under section 516A of the Tariff Act of 1930 (*i.e.*, antidumping and countervailing duty determinations, including Commission injury determinations).

[18] 28 U.S.C. § 1295(a)(5) (the Federal Circuit has exclusive jurisdiction of an appeal from a final decision of the Court of International Trade); *see also* 28 U.S.C. § 1581(h) (stating that the Court of International Trade has exclusive jurisdiction over Customs' rulings, including classification and valuation rulings).

jurisdiction is not limited to matters involving international trade.[19] Because Federal Circuit precedent contradicts the precedent of the D.C. Circuit—the other court of appeals with substantial responsibility for reviewing agency action—it creates an unwarranted conflict in the law governing federal agencies.

Finally, the need for a remand is certain to occur in an ongoing appeal to the Federal Circuit of the second administrative review of the Dutch Steel Antidumping Order.[20] *Corus Staal BV v. United States,* Appeal No. 2006-1652, appealed from the U.S. Court of International Trade, Case No. 05-CV-00354. For the reasons discussed above regarding the first administrative review, Commerce's announced change in policy in the Dutch Steel Antidumping Proceeding requires a remand in the second administrative review as well. Just as Commerce will have to determine whether the abandonment of zeroing should affect the first administrative review, Commerce also will have to determine whether it should affect the second administrative review. This is particularly the case because it is uncontested that the change in policy will lead to a negative dumping determination, thus invalidating the Dutch Steel Antidumping Order and re-

---

[19] *See generally* 28 U.S.C. § 1295(a) (describing the jurisdiction of the Federal Circuit to include, *inter alia*, determinations of the U.S. Patent and Trademark Office, the Secretary of Commerce, the Merit Systems Protection Board, and an agency board of contract appeals).

[20] As discussed *supra* p. 5, pursuant to a request from "interested parties" (*e.g.*, the U.S. domestic industry or foreign producers), Commerce conducts annual administrative reviews of antidumping orders in order to establish the amount of duties to be assessed on entries covered by the administrative review and to establish the cash deposit rates for future entries. In the Dutch Steel Antidumping Proceeding, Commerce has concluded the first and second administrative reviews and is currently conducting the fourth and fifth administrative reviews. The third administrative review was not conducted because of a lack of interest from interested parties.

quiring termination of the Dutch Steel Antidumping Proceeding. A remand is required, therefore, in order for Commerce to determine whether any agency action may be taken pursuant to the invalidated order in either the first administrative review or the second administrative review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD OLAF CUNNINGHAM *
JOEL DENNIS KAUFMAN
ALICE ALEXANDRA KIPEL
WILLIAM GEORGE ISASI
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record

Counsel for Petitioner
Corus Staal BV

January 25, 2007

APPENDIX

APPENDICES

APPENDIX A — Page

Orders of the Federal Circuit

Order Denying Petition for Rehearing and Rehearing *En Banc* 1a

Order Without Opinion Affirming Court of International Trade 2a

APPENDIX B

Opinion of the Court of International Trade..... 3a

APPENDIX C

Department of Commerce Amended Final Determination 28a

APPENDIX D

Department of Commerce Final Determination 35a

APPENDIX E

Statutory Provisions..... 45a

19 U.S.C. § 3533 ..... 45a

19 U.S.C. § 3538 ..... 49a

APPENDIX F

Corus' Petition for Rehearing *En Banc* Before the the Federal Circuit 54a

APPENDIX G

European Communities' Request for a WTO Panel in Zeroing Dispute 75a

APPENDIX H

U.S. Statements before WTO Dispute Settlement Body Agreeing To Implement *U.S.-Zeroing*..... 105a

APPENDICES—Continued

APPENDIX I — Page

Department of Commerce *Federal Register* Notice Announcing Change in Zeroing Methodology 109a

APPENDIX J

Department of Commerce *Federal Register* Notice Confirming Change in Zeroing Methodology 114a

APPENDIX K

Second Written Submission of the United States in Section 129 WTO Challenge 129a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed SEP 12, 2006]

ORDER

A petition for rehearing en banc having been filed by the Appellant, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED. The mandate of the court will issue on September 19, 2006.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

cc: Joel D. Kaufman
Claudia Burke, John J. Mangan

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed JUN 13, 2006]

05-1600

CORUS STAAL BV,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of International Trade.

IN CASE NOS. 04-00316

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

Per Curiam (RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and LINN, *Circuit Judge*.)

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBALY, Clerk

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 04-00316
Before: Jane A. Restani, Chief Judge

CORUS STAAL BV,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

UNITED STATES STEEL CORPORATION,

Defendant-Intervenor.

OPINION

Restani, *Chief Judge*: This matter is before the court on the plaintiff Corus Staal BV's ("Corus") motion for judgment on the agency record pursuant to United States Court of International Court No. 04-00316 Page 2 Trade Rule 56.2. At issue are the final results of the first administrative review of an antidumping duty order by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department") of hot-rolled steel from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 33,630 (Dep't Commerce June 16, 2004) (final admin. rev.), *as amended by*, 69 Fed. Reg. 43,801 (Dep't Commerce July 22, 2004) (am. final admin. rev.) [hereinafter *Final Results*].

Corus claims (1) that the agency's use of a "zeroing" methodology is contrary to law, and (2) that its use of the date of entry (instead of the date of sale) for selection of certain export price ("EP") transactions is both contrary to law and

unsupported by substantial evidence. Corus claims that zeroing, whereby "negative dumping margins," *viz*, where the U. S. price is higher than the normal value ("NV"), are set to zero in calculating Corus's weighted average dumping margin (and concomitant assessment rate) do not properly allow non-dumped sales to offset dumped sales, introducing an "improper statistical bias into the calculation." Pl.'s Br. at 2. Corus further claims that this court and the Court of Appeals for the Federal Circuit have held that zeroing is not required by statute, and, therefore, this court may only uphold Commerce's methodology if it is reasonable, which Corus asserts it no longer is, given the WTO Antidumping Agreement, see Pub. L. No. 103- 465, 108 Stat. 4809 (1994), and recent WTO decisions.[1]

In addition, Corus argues that Commerce erred legally and factually by using the date of entry to select certain EP transactions for review, which it asserts is inconsistent with its use of the date of sale for other EP transactions and all constructed export price ("CEP") sales. Because, allegedly, Commerce offered no reasonable explanation for basing its review in some instances on the date of sale and in others on the date of entry, and offered no explanation for deviating from its prior and exclusive use of the date of sale as a

---

[1] *See, e.g., United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 2004 WTO DS LEXIS 18 (Aug. 11, 2004, adopted Aug. 31, 2004) (appellate body report) ("*Softwood Lumber*"); *United States—Sunset Review of Anti-Dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, 2003 WTO DS LEXIS 218 (Dec. 15, 2003, adopted Jan. 9, 2004) (appellate body report) ("*Corrosion-resistant Steel*"); *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, 2001 WTO DS LEXIS 13 (Mar. 1, 2001, adopted Mar. 12, 2001) (appellate body report) ("EC-Bed Linen").

selection criterion in its preliminary results,[2] Corus asks the court to enter an order remanding this administrative review to Commerce. Corus also asks this court to instruct Commerce, on remand, (1) to re-calculate Corus's dumping margin, cash deposit rate, and assessment rate without resort to zeroing; (2) to use, exclusively, the date of sale to select the transactions to be reviewed during the period of review ("POR") (instead of date of sale for CEP transactions and a combination of date of sale and date of entry for EP transactions); and (3) to refund the amount of estimated antidumping duty deposits collected in excess of the lawful amount.

In response to plaintiff's motion, both the defendant ("Government" or "Commerce"), and the United States Steel Corporation ("U. S. Steel"), the defendant-intervenor, argue that Corus's motion, with respect to zeroing, should be denied because the final results are in accordance with law. Commerce, citing decisions by this court and the Federal Circuit, which have both repeatedly sustained Commerce's methodology, asserts: (1) zeroing is a "reasonable" interpretation of an ambiguous statutory provision regarding dumping margins and weighted average dumping margins, *see* 19 U.S.C. § 1677(35) (2000); and (2) the WTO reports cited by Corus are legally irrelevant, for numerous reasons. U. S. Steel agrees with Commerce that the Department's use of zeroing was proper, and that Corus's reliance on WTO decisions is misplaced, but also asserts that zeroing is not merely in accordance with law but that its use is actually required by law.

As for the second issue, regarding Commerce's classification of certain U. S. sales as EP sales, Commerce and U.S. Steel disagree. Commerce asks the court to remand the issue

---

[2] *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 68 Fed. Reg. 68,341 (Dep't Commerce Dec. 8, 2003) (prelim. admin. rev.) [hereinafter *Prelim. Results*].

to Commerce to re-classify certain EP transactions; U.S. Steel requests that the plaintiff's motion, in all respects, be denied. U.S. Steel asserts that Corus mischaracterized certain sales (those made to its just-in-time ("JIT") customers) as EP sales, and argues that any sales made after importation must, according to the statutory terms, *see* 19 U.S.C. § 1677a(a)–(b) (2000), be CEP sales. U.S. Steel further argues that the Department properly utilized its standard methodology of using the date of sale during the POR for CEP sales (and for EP-classified sales made after importation, such as CEP sales normally are), and of using the date of entry for ordinary EP sales. As explained below, the court concludes that remand is not appropriate and the final results of the administrative review are sustained.

PROCEDURAL HISTORY

This appeal arises out of the first administrative review of an antidumping duty order regarding hot-rolled steel from the Netherlands. U. S. Steel, a domestic producer of hot-rolled steel, and a defendant-intervenor in these proceedings, was both a petitioner in the investigation that resulted in Commerce's antidumping duty order and an active participant in the administrative proceedings below. Corus, the plaintiff, is a producer of hot-rolled steel in the Netherlands and brought this appeal to challenge two aspects of the final results that pertain to the calculation methodology Commerce used to determine the 4.80% weighted average dumping margin applicable to Corus: (1) zeroing; and (2) the change in selection criterion from date of sale, to date of sale for all CEP transactions and certain EP transactions and date of entry for the remaining post-importation EP sales. *See Final Results*, 69 Fed. Reg. at 33,631 and accompanying *Issues & Decision Mem.* [hereinafter "*Issues Mem. to Steel from the Netherlands*"], at cmts. 4, 10, *as amended by*, 69 Fed. Reg. at 43,802.

On November 29, 2001, Commerce published the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't Commerce Nov. 29, 2001) (antidumping duty order). On November 1, 2002, Commerce published notice of the opportunity to request an administrative review of certain hot-rolled carbon steel flat products from the Netherlands, covering the period from May 3, 2001, to October 31, 2002. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 67 Fed. Reg. 66,612 (Dep't Commerce Nov. 1, 2002) (opportunity to req. admin. rev.).

On November 26 and 27, 2002,[3] a group of U. S. steel companies, including U.S. Steel, pursuant to 19 C.F.R. 351.213(b)(1) (2004),[4] requested that Commerce, in accordance with 19 U.S.C. § 1675 (2000),[5] conduct an administrative review of Corus's sales of the subject merchandise. On December 26, 2002, Commerce published a notice of initiation of this antidumping duty administrative review, covering the period from May 3, 2001, through October 31, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78,772 (Dep't Commerce Dec. 26, 2002). On January 9, 2003, Commerce issued its

---

[3] Nucor Corporation filed its request for administrative review on November 26, 2002; Bethlehem Steel Corporation, National Steel Corporation, and U.S. Steel filed their request on November 27, 2002. *Prelim. Results*, 68 Fed. Reg. at 68,342 n.1.

[4] Allowing domestic interested parties to request an administrative review of an antidumping or countervailing duty order each year during the anniversary month of the order's publication.

[5] Providing for periodic review of duty order amount, at least once during each 12-month period, beginning on the anniversary of the date of publication of the antidumping duty order, if a request for such a review has been received.

antidumping duty questionnaire to Corus—an ongoing question and response process that lasted from then until May 19, 2003, when Corus responded to Commerce's third supplemental questionnaire. *See Prelim. Results*, 68 Fed. Reg. at 68,342. Commerce then verified Corus's submitted data and requested Corus to report entered value data. *See id.* Also, as a result of the court's decision in *Corus Staal BV v. United States*, 283 F. Supp. 2d 1357, 1358 (Ct. Int'l Trade 2003), the Department will not assess duties on subject merchandise that entered between October, 30, 2001, and November 28, 2001, inclusive. *See also Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 68 Fed. Reg. 60,912, 60,912 (Dep't Commerce Oct. 24, 2003) (final ct. decision & suspension of liquidation).

On December 8, 2003, Commerce published its preliminary results from the administrative review of the antidumping duty order on hot-rolled steel from the Netherlands. *See Prelim. Results*, 68 Fed. Reg. at 68,341. After issuance of these preliminary results, the Department invited comments; and in response, Corus, U. S. Steel, and Nucor filed case briefs on January 14, 2004, and submitted rebuttal briefs on January 23, 2004. *See Final Results*, 69 Fed. Reg. at 33,630. After Corus timely-filed a ministerial error allegation, in accordance with 19 C.F.R. 351.224(c)(2) (2004),[6] the Department revised its antidumping duty margin for Corus, decreasing it from the original 4.94% assessment to the currently contested 4.80% ad valorem. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 43,801, 43,801–02 (Dep't Commerce July 22, 2004) (am. final admin. rev.). Corus timely commenced this action

---

[6] Setting five days as the time limit for submitting comments regarding ministerial errors.

under 19 U.S.C. § 1516a(a)(2)(A)(i),[7] (B)(iii)[8] (2000), and 28 U.S.C. § 1581(c) (2000).

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The court, in reviewing one of Commerce's administrative determinations, will uphold the challenged determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Request For Remand Is Denied

Prior to oral argument, the court denied Commerce's request for a remand. The request was both unsupported and unexplained. With respect to the classification of sales as EP or CEP, Commerce simply stated that "[u]pon further review . . . certain transactions were mistakenly classified as EP transactions." Resp. Br. at 26.

In *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), the Court of Appeals addressed the issue of a voluntary remand when Commerce's original determination, denying a favorable adjustment to the plaintiff-appellant, was not required by statute. After initially determining, during the administrative review, that the loss incurred on the sale of a subsidiary should be included in the plaintiff's general and administrative ("G&A") expense calculation, Commerce, on appeal before the Court of International Trade, "reversed course," and instead of defending its final results, sought a remand, arguing, in accordance with the

---

[7] Allowing review of administrative determinations on the record within thirty days of the date of publication in the Federal Register.

[8] Defining reviewable determinations to include final determinations by the "administering authority" (Commerce) or the "Commission" (International Trade Commission) under 19 U.S.C. § 1675.

plaintiff's position, that the loss should no longer be included in the G&A expense calculation. *Id.* at 1026.

Obviously, this case differs from *SKF* because Commerce's remand request is not so that it may bestow a benefit on the party paying duties. Here, the request is in response to defendant-intervenor U.S. Steel's brief, which claims a misclassification—"because these so-called EP sales did not meet the statutory definition of EP," (*see* Def.-Intervenor's Br. at 25–26)—although U.S. Steel admits it missed the time for filing suit to change the classification. Nonetheless, *SKF* may be instructive because the court explained that an agency may seek a remand (1) to reconsider its decision because of intervening events outside of the agency's control; (2) to reconsider its previous position even if there are no intervening events; or (3) because it believes that its original decision was incorrect on the merits and it wishes to change the result. 254 F.3d at 1028–29.

The first situation does not apply to this case.

With respect to the second situation, the Federal Circuit explained that an agency may "simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies." *Id.* at 1029. In that situation, the reviewing court has discretion over whether to remand, and may refuse a remand if the agency's request is "frivolous or in bad faith." *Id.* But, "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.* Here, there does not appear to be any substantial or legitimate administrative concern warranting a remand. Commerce's stated reason for requesting a remand was simply "to correct this classification so that its written position is consistent with the factual record." Def.'s Resp. Br. at 26. Commerce articulated no other policy issue or view, nor did it otherwise express any doubts about the correctness of its decision in relation to the agency's other policies.

With respect to the third situation, the court held that a "[r]emand to an agency is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations." *SKF*, 254 F.3d at 1029. The court explained that "[a]lthough a court need not necessarily grant such a remand request, remand may conserve judicial resources, or the agency's views on the statutory question, though not dispositive, may be useful to the reviewing court." *Id.*

Here, a remand would not seem to preserve judicial resources or permit application of Commerce's views on a statutory question. *See Corus Staal BV v. United States*, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) ("*Corus Staal I*") ("[C]oncerns for finality do exist and the agency must state its reasons for requesting remand. Further, if only to guard against the 'bad faith' requests of concern to the court in *SKF*, the court must be apprised of the reason for the remand request, whether it be on account of error or merely a change in policy.").

While there was a vague reason given here, which exceeds the information provided in the earlier *Corus Staal I* case, this was still insufficiently informative. There is no real evidence that Commerce erred. While the EP sales at issue appear were invoiced after importation, a hallmark of CEP sales, the statute does permit, inter alia, "post-importation" EP sales where the sale is pre-negotiated. *See* 19 U.S.C. § 1677a(a) ("The term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation . . . ."). Thus, if an error did occur, Commerce needed to explain it in detail.

Furthermore, U.S. Steel avers that reclassifying the sales from EP to CEP would have an insignificant effect on the dumping margin, and it does not seek this relief. Accordingly, if the court has discretion over whether to grant this remand request, the court exercises such discretion to deny this

request for remand, which likely would simply delay this matter for no substantial reason.

The court is concerned that Commerce is taking some broad language in the *SKF* decision, the holding of which may apply to a very narrow group of cases, out of context, simply to avoid dealing with difficult methodological issues. In this case, Commerce did not even brief the issue of the proper date for selection of EP and CEP sales, relying instead on its unsupported request for remand to delay the day of reckoning. This was a disservice to the court, as the court must resolve this issue. The interests of both plaintiffs and defendants depend on the prompt and orderly resolution of these matters, which Congress clearly intended.[9] The Government must give due regard to finality and cannot simply ask for a do-over any time it wishes.

II. Commerce's Use Of Zeroing Is Reasonable And In Accordance With Law

As Corus noted in its brief, numerous cases before this court and the Federal Circuit have held that "zeroing" is neither required nor prohibited by the U.S. statute, *see* 19

---

[9] Reflecting the need for expedition in these matters, United States Court of International Trade Rule 3(g) provides for the precedence of unfair trade cases over most other actions, and the statute contains a series of time limitations on Commerce's actions. *See* USCIT Rule 3(g) (listing an action contesting a determination in a countervailing or antidumping duty proceeding third in order of precedence, following only an action seeking injunctive relief and an action involving the exclusion or redelivery of perishable merchandise); 19 U.S.C. § 1675(a)(3)(A) (requiring, if practicable, "[t]he administrating authority [to] make a preliminary determination [in a review as to the amount of any antidumping duty] within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review . . . is requested, and a final determination . . . within 120 days after the date on which the preliminary determination is published.").

U.S.C. § 1677(35)(A),[10] (B),[11] in either an investigation, *see, e.g., Corus Staal I*, 259 F. Supp. 2d at 1261, or an administrative review, *see, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1341–42 (Fed. Cir.), *cert. denied*, 125 S. Ct. 412 (2004) ("*Timken*").

Despite these prior holdings, Corus argues that fundamental structural changes to the U.S. Antidumping statute, as implemented in the Uruguay Round Agreements Act ("URAA"), render zeroing inherently unreasonable, citing recent WTO decisions for further support that zeroing is no longer reasonable. *See supra* note 1. The Federal Circuit, however, in addressing arguments similar to the ones Corus now presents before the court, (1) expressly affirmed the reasonableness of Commerce's use of zeroing in an antidumping administrative review, and (2) accorded no deference to Corus's cited WTO cases, again concluding that WTO decisions are not binding on the U.S. and cannot trump domestic legislation. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1346–49 (Fed. Cir. 2005) ("*Corus Staal II*") (holding that (1) "[o]ur decision in *Timken* addressed Commerce's interpretation of section 1677(35);" and (2) "[w]e give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination"). While it is highly debatable whether the intricacies of margin calculation involve foreign policy, the Government's response to WTO

---

[10] 19 U.S.C. § 1677(35)(A). The statute states: "The term 'dumping margin' means the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." (emphasis added).

[11] 19 U.S.C. § 1677(35)(B). The statute states: "The term 'weighted average dumping margin' is the percentage determined by dividing the aggregate *dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." (emphasis added).

decisions vary; and, as the Federal Circuit noted, a court should "not attempt to perform duties that fall within the exclusive province of the political branches." *Id.* at 1349. Because decisions by the Federal Circuit are binding on this court, Corus's arguments regarding the reasonableness of zeroing, therefore, must fail.

Corus's final argument was also addressed by the Federal Circuit in *Corus Staal II*; however, Corus now relies on changed facts. Specifically, Corus attempts to capitalize on the Federal Circuit's caveat in *Corus Staal II*: "[W]e . . . refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body *unless and until* such ruling has been adopted pursuant to the specified statutory scheme." *Id.* (emphasis added). Corus argues that the WTO's *Softwood Lumber* decision, which prohibited the use of zeroing in calculating dumping margins under the weighted-average-to-weighted-average methodology, has been "adopted pursuant to the specified statutory scheme," and therefore, the court should rule zeroing no longer reasonable, not based on the WTO ruling itself, but on Commerce's re-interpretation of its policy in the wake of the adverse *Softwood Lumber* ruling.

Before any agency regulation or practice can be modified to conform to an adverse WTO ruling, Commerce must follow the particular statutory scheme Congress enacted. *See id.* This process mandates consultation between the various political branches of the Executive and Congress "to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation." *Id.; see also* 19 U.S.C. §§ 3533(f)–(g), 3538 (2000).[12]

---

[12] These steps include: (1) consultation between the U.S. Trade Representative ("USTR"), agency, relevant congressional committees, and the private sector; (2) notice and comment; (3) publication of the modification and its explanation in the Federal Register; and (4) further consultation

Corus submits that the "critical steps" had already been taken by the time of the Federal Circuit's decision in *Corus Staal II*.[13] In *Corus Staal II*, the Federal Circuit was quite clear that it "reject[ed] *Softwood Lumber* as nonbinding because the finding therein was not adopted as per Congress's statutory scheme." 395 F.3d at 1349. Therefore, until all of the statutorily mandated procedures have been fully complied with, it matters not whether the "critical steps" have already been taken. Since the Federal Circuit issued its opinion in *Corus Staal II*, Commerce has subsequently issued both its preliminary and final determinations to implement *Softwood Lumber*. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, Pl.'s Addendum 1 (Apr. 15, 2005) ("*Sec. 129 Determ.*"). Corus stresses that the determination has been forwarded to the USTR, but Commerce correctly notes that the USTR still must direct the Department to implement the determination, "in whole or in part." *Sec. 129 Determ.* at 1, 38. *See* 19 U.S.C. § 3538(b)(4).[14] Thus, the statutorily mandated procedure is incomplete.

---

between the USTR, agency, and relevant congressional committees regarding implementation of the new determination.

[13] Corus identifies the "critical steps" as (1) U. S. notification to the WTO that it would implement the *Softwood Lumber* decision, (2) consultation with Commerce and Congress, and (3) instruction by the USTR directing Commerce to draft a section 129 determination implementing *Softwood Lumber*. Pl.'s Reply Br. at 3 n.2.

[14] 19 U.S.C. § 3538(b)(4) states that "[t]he Trade Representative *may*, after consulting with the administering authority and the congressional committees . . . , direct the administering authority to implement, in whole or in part, the determination . . . ." (showing that even after a final determination, the USTR need not instruct Commerce to implement it) (emphasis added).

Even if the USTR had directed the Department to implement the determination in full, it still would not be applicable to this case.[15] Unlike a section 123 proceeding, which concerns implementation of panel reports regarding a WTO member's general practices, a section 129 report only affects the implementation of the specific investigation at issue, in this case softwood lumber from Canada. *Compare* URAA § 123, 19 U.S.C. § 3533, *with* URAA § 129, 19 U.S.C. § 3538.[16] Moreover, the WTO Appellate Body's report in *Softwood Lumber* made clear that the only issue before it was zeroing "*as applied*" in that case to Canadian lumber: "no methodology, *as such*, has been challenged." *Softwood Lumber*, WT/DS264/AB/R at ¶ 63 (emphases in original). Further, even if the general methodology were at issue, section 129(c)(1) of the URAA, 19 U.S.C. § 3538(c)(1), explicitly provides that any section 129 redetermination by Commerce will only affect the unliquidated entries of subject merchandise that "are entered, or withdrawn from warehouse, for consumption *on or after* . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." 19 U.S.C. § 3538(c)(1)(A) (emphasis added). In its section 129 determination, Commerce notes that the "SAA clearly provides,

---

[15] On April 27, 2005, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, 19 U.S.C. § 3538(b)(4), (c)(1)(B), the USTR, after consulting with Commerce and Congress, directed the Department to implement the determination. *See Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce May 2, 2005) (final determ. under sec. 129 of URAA) [hereinafter *Final Section 129 Determination*].

[16] Section 123(f)(3) discusses generally "whether to implement the [WTO] report's recommendation" and section 123(g)(1) regards "[c]hanges in agency regulations or practice." 19 U.S.C. § 3533(f)(3), (g)(1). Section 129, in contrast, discusses everything in terms of "particular proceedings," from the initial agency action, to the re-determination, to the implementation of the re-determination. 19 U.S.C. § 3538.

'such [section 129] determinations have prospective effect only.'" URAA Statement of Administrative Action, accompanying H.R. Rep. No. 103-316, at 1026 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313 ("SAA"); *Sec. 129 Determ.* at 4; *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,637.

Lastly, even Commerce's section 129 determination implementing *Softwood Lumber* limits the effect of the adverse WTO ruling. In the redetermination, Commerce changed its methodology from using a weighted-average-to-weighted-average methodology, which was the subject of the "as applied" challenge in *Softwood Lumber*, to using an individual-to-individual transaction methodology. *See Sec. 129 Determ.* at 6, *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,637. Commerce's change, however, is "not inconsistent with the findings of the panel or the Appellate Body," *see* 19 U.S.C. § 3538(b)(2), because the individual-to-individual methodology, as the WTO Appellate Body noted, was not addressed by its *Softwood Lumber* ruling. *Softwood Lumber*, WT/DS264/AB/R at ¶ 63. Underscoring the specificity of this change, Commerce noted that by switching its methodology it was "not intending to implement an approach that applies to all antidumping investigations." *Sec. 129 Determ.* at 12; *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,639. Even with respect to the *Softwood Lumber* investigation, and despite employing the changed methodology, Commerce still used zeroing. In its redetermination, Commerce stated that because the WTO ruling "requires the offset for non-dumped sales [i.e., does not allow zeroing] only for a weighted-average-to-weighted-average comparison, we have not applied the offset for non-dumped sales [i.e., we have used zeroing] in our transaction-to-transaction comparison." *Id.* Therefore, even if the USTR directs Commerce to implement the process in one case, the overall process has not changed.

In sum, the WTO decision-making process operates apart from the decision-making in this court. WTO decision-mak-

ing starts with an international agreement, which may not match the domestic statute and which is interpreted pursuant to different principles. From there, the process follows an entirely separate implementation scheme. Had the Government appeared here saying it had lost in the WTO, with respect to this very administrative determination, and it had complied with the entire statutory framework, to the effect that it was reversing its position, even as to a past determination, then the court would have to consider what to do. This, however, has not happened, and the court is bound by circuit precedent upholding zeroing.

III. Commerce's Change In Methodology For Selecting The Sales Used In The Margin Calculation Is Reasonable And In Accordance With Law

Corus's database consists of two categories of U.S. sales: constructed export price sales, which were made through Corus's U. S. affiliate, and export price sales, which were made by Corus.[17] In the *Preliminary Results*, Commerce selected the U.S. sales to be included in the margin calculation, regardless of whether the sale was CEP or EP, on the basis of whether the date of sale was within the POR. This meant that certain EP sales—those with a date of sale prior to

---

[17] "'[E]xport price' means the price at which the subject merchandise is first sold (or agreed to be sold) *before the date of importation* by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c)." 19 U.S.C. § 1677a(a) (emphasis added).

"'[C]onstructed export price' means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States *before or after the date of importation* by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d)." *Id.* at § 1677a(b) (emphasis added).

the POR but with an entry date during the POR—were excluded from the margin calculation.

Prior to the *Final Results*, U. S. Steel argued in its case brief that the date of sale methodology used to select U.S. sales was incorrect, as applied to Corus's EP sales. In support, U. S. Steel showed that, consistent with Commerce's antidumping questionnaire, Commerce's normal practice was to use date of sale for CEP sales and date of entry for EP sales. *See Commerce's Antidumping Duty Questionnaire* (Jan. 9, 2003), at C-1, P.R. Doc. 207, Def.-Intervenor's App., Tab 1, at 2 ("Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a date of sale within the POR."). EP sales, which by statute must take place prior to importation (i.e., date of entry) normally can be tied to entries during the period. CEP sales, on the other hand, which may take place following importation, are often difficult or impossible to tie to specific entries.

In response, Corus argued that the sales-based approach used in the *Preliminary Results* should be applied to all of its sales to ensure no transactions escape review because: (1) date of sale corresponds to its audited financial records and its use would require no end-of-period reconciliations, and (2) given the length of time between entry date and date of sale for the JIT inventory sales, there likely would be entries sold from JIT inventory that would not be invoiced until after the conclusion of the review period and, thus, too late to be captured by the review; and under Commerce's entry date methodology, such sales would never be reported because they could not be included in any subsequent review. *See* Corus's Reply Br., (Jan. 23, 2004), at 7–9, P.R. Doc. 80, Pl.'s App., Tab 3, at 4–6; *see also Issues Mem. to Steel from the Netherlands*, at cmt. 10.

In the final results, Commerce rejected Corus's position. Commerce stated that

> We agree with petitioners. In accordance with the Department's normal practice, for those sales which occurred prior to importation, we have used the date of entry to select those transactions used in our analysis. This methodology comports with the Department's standard administrative review questionnaire, which instructs respondents to report such sales of merchandise which entered for consumption during the POR. This methodology is also consistent with that used in other antidumping duty administrative reviews. Thus, for these final results, we have amended our margin calculation program so that for sales which occurred prior to importation, the entry date was used to define those sales used in our analysis.

Issues Mem. To Steel from the Netherlands (June 16, 2004), at cmt. 10, P.R. Doc. 398, Def.-Intervenor's App., Tab 6, at 4 (citation omitted). In implementing its decision, Commerce did the following: (1) for sales classified as CEP, it continued to use the date of sale; (2) for sales classified as EP, where the sale took place prior to importation, it used the date of entry; and (3) for sales classified as EP, but where the invoice date (and hence the shipment date and presumed date of sale) took place after importation, it used the date of sale.

A. Commerce Properly Used Its Normal Method For Corus's CEP And Pre-Importation EP Sales

Corus argues that Commerce should have used the date of sale methodology for all of its sales. Corus further argues that Commerce may not use different bases (which it refers to as "hybrid") in the same administrative review to select the sales to be analyzed. U.S. Steel disagrees.

The statute does not specify whether Commerce should use the date of entry or the date of sale as the basis on which to

select transactions for review. *See Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 933, 24 F. Supp. 2d 304, 310 (1998) ("[T]he statute is silent with respect to the universe of sales to be used in calculating dumping margins . . . ."). Commerce has adopted a regulation, however, that gives it the flexibility to use date of sale, date of export, or date of entry, as appropriate. The regulation provides that

> [f]or requests received during the first anniversary month after publication of an order . . . an administrative review under this section will cover, as appropriate, *entries, exports, or sales* during the period from the date of suspension of liquidation . . . to the end of the month immediately preceding the first anniversary month.

19 C.F.R. § 351.213(e)(1)(ii) (emphasis added).

Commerce's general preference is to use entries during the POR as the basis for selecting the U.S. sales to be analyzed. In *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578, 55,589 (Dep't Commerce Oct. 16, 1998) (final admin. rev.), for example, Commerce analyzed all U. S. sales that entered during the POR, stating that

> [a]lthough the Department's regulations at section 352.213 (e) provide some flexibility in this issue, the Department's preference is to review sales based on entry dates unless there are compelling circumstances that warrant a different approach to determining the universe of sales to be examined during a particular review.

Id. at cmt. 9. Similarly, in *Issues & Decision Memorandum to Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, 70 Fed. Reg. 13,458 (Dep't Commerce Mar. 21, 2005) (final admin. rev.), the Department explained that

> [w]e note that in section 751(a)(2)(A) of the Act [19 U.S.C. § 1675(a)(2)(A)], a dumping calculation should

> be performed for each entry during the POR. While section 351.213(e) of the Department's regulations does give the Department some flexibility in this regard by stating that the review can be based on entries, exports, or sales, it is our preference to base the review on entries where possible. In this case, we find no compelling reason to move away from our standard practice of using entries to determine the universe of U.S. sales to be reported for EP sales.

Id. at cmt. 5. *See also Helmerich*, 22 CIT at 935–36, 24 F. Supp. 2d at 311 (quoting Commerce as stating that its "usual practice in export price situations is to review and assess duties on entries within the POR, regardless of whether the sales occurred prior to the review period"). Therefore, Commerce's review of the EP sales in this case, based on the date of entry, is in accordance with its standard methodology.

Furthermore, the court has upheld Commerce's entry-based methodology as reasonable. In *Helmerich*, the court upheld Commerce's use of the date of entry as a selection criterion, even though the merchandise that entered during the POR came from a foreign trade zone and had been sold to the customer before the POR and before the antidumping duty order had been entered. 22 CIT at 928, 938–39, 24 F. Supp. 2d at 306, 313–14. The court explained that the entry-based approach resulted in a more accurate measure of dumping and ensured that all relevant sales were considered. *Id.* at 937–38, 24 F. Supp. 2d at 313.

Although Commerce's general preference is to use the date of entry, it often uses the date of sale as the selection criterion for CEP sales. This is because, in many CEP situations, the sale is made after importation and it is often difficult or impossible to tie entries to sales. *See id.* at 938 n.9, 24 F. Supp. 2d at 313 ("In certain situations such as CEP situations where Commerce cannot tie entries to future sales, or when the Department cannot ascertain entry dates, Commerce

cannot calculate margins based on sales linked to entries. Therefore, Commerce may resort to the less accurate approach of calculating margins based on possibly unlinked sales during the POR."); *see also Dynamic Random Access Memory Semiconductors of One Magabit or Above from the Republic of Korea*, 66 Fed. Reg. 30,688, 30,692 (Dep't Commerce June 7, 2001) (prelim. admin. rev.) (using sales made during the POR to calculate the weighted-average dumping margins for CEP transactions). This approach has been upheld as reasonable.

In *NSK Ltd. v. United States*, 17 CIT 590, 594–95, 825 F. Supp. 315, 320 (1993), for example, the court upheld Commerce's decision to examine exporter's sales price ("ESP") transactions (now CEP transactions under the URAA) on the basis of sales made during the POR. In holding, *inter alia*, that Commerce's review of all CEP sales made during the POR, rather than review of only the subject merchandise entered and sold during the review period, was reasonable and in accordance with the law, the court noted Commerce's reasoning with respect to these CEP sales: (1) there is usually a lag time between entry and sale, (2) entry data is often unavailable, (3) a dumping margin cannot be determined without a sale, (4) dumping on sales made during the POR is representative of dumping on entries made during the POR, and (5) review of sales, which can cover many entries of merchandise, can eliminate the need for conducting multiple reviews of the same information. *Id.* at 595, 24 F. Supp. 2d at 320; *see also Ad Hoc Comm. of S. Cal. Producers of Gray Portland Cement v. United States*, 19 CIT 1398, 1407, 914 F. Supp. 535, 544 (1995) (upholding Commerce's use of sales, rather than entries, during the POR to calculate a dumping margin as selection criterion for CEP sales). Therefore, Commerce's use of the date of sale as a selection criterion for Corus's CEP sales is in accordance with its standard procedure and is reasonable.

Corus relies on *Hynix Semiconductor, Inc. v. United States*, 248 F. Supp. 2d 1297 (Ct. Int'l Trade 2003), to argue that Commerce's "hybrid" methodology—using date of entry to select those EP transactions where the sale had occurred prior to importation, but using date of sale to select all other EP and all CEP transactions—is unreasonable.[18] In *Hynix*, the court sustained Commerce's decision to use the date of sale as the selection criterion for CEP sales at issue. *Id.* at 1303–04. The court found that Commerce properly abandoned the method used in the preliminary results, where it had calculated the dumping margin by using the CEP sales made during the POR, plus CEP entries made during the period (which were sold after the POR). *Id.* at 1300. The court explained that "nothing in Commerce's regulations supports the use of a hybrid sales plus POR-entries approach for calculating dumping margins." *Id.* at 1304. This case is different. Here, Commerce did not use such a "hybrid" approach; it used two distinct approaches—sales during the POR for CEP transactions and entries during the POR for pre-importation EP transactions—both of which were previously upheld as reasonable.

---

[18] Corus also relies on *Hynix* to argue that Commerce should have continued to use the same approach to be consistent with its *Preliminary Results*. Although the *Hynix* court did recognize the value of being consistent *across* administrative reviews, *see* 248 F. Supp. 2d at 1304 (noting that *Hynix* involved the sixth administrative review), the review here, in contrast, is only the first administrative review of Corus's sales and hence, there is no prior review with which to be consistent. *See Helmerich*, 22 CIT at 937 n.8, 24 F. Supp. 2d at 313 ("In contrast [to *Portable Electric Typewriters from Japan*, 56 Fed. Reg. 56,393, 56,393 (Dep't Commerce Nov. 4, 1991), which was a review covering the periods May 1, 1988, through April 30, 1989, and May 1, 1989, through April 30, 1990, for an antidumping duty order entered in May 1980], this case deals with a first administrative review. Therefore, Commerce was not constrained to utilize a sales-based approach to remain consistent.").

Furthermore, in *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 63 Fed. Reg. 39,071, 39,072 (July 21, 1998) (am. final admin. rev.), Commerce followed this approach, reviewing all CEP sales with a sale date during the POR and all EP sales with an entry date during the POR.

Therefore, Commerce's use of the date of entry to select Corus's pre-importation EP sales, and the date of sale to select Corus's CEP sales is reasonable and in accordance with its prior practice. Thus, as to these two categories, there is no error.

B. Commerce's Use Of Sales Date To Select Corus's "Post-Importation" EP Sales Was Proper

Corus also argues that Commerce's methodology was improper because Commerce reviewed Corus's pre-importation EP sales differently from its "post-importation" EP sales.

Commerce did use the date of sale to select those EP-classified sales that Corus invoiced after importation. Yet, as discussed above, the statute defines EP sales as those transactions occurring "before the date of importation" while CEP sales may occur "before or after the date of importation." See supra note 17. Thus, because the EP sales at issue could not be treated in the same manner as the other EP sales, Commerce treated them as it treated CEP sales—by reviewing them according to date of sale, because the same matching difficulties that exist for post-importation CEP sales also exist for "post-importation" EP sales, as both sides admitted at oral argument.

Corus argues that because the only parties to these "post-importation" EP sales were Corus and the particular U. S. customer (not a U. S. affiliate), and because Corus maintained its own U. S. inventory and invoicing, the sales, were in fact, properly classified as EP sales and should have been selected

on the same basis as other EP sales.[19] In *AK Steel Corp. v. United States*, 226 F.3d 1361, 1369–70 (Fed. Cir. 2000), the Federal Circuit examined the definitions of EP and CEP and noted that the two factors dispositive of the choice between the two classifications are (1) whether the sale takes place inside or outside the United States, and (2) whether it is made by an affiliate. Referring to the CEP definition, the court then defined the term "seller" as "one who contracts to sell" and the term "sold" as the "transfer of ownership or title." *Id.* at 1371.

First, with respect to the location factor, it is undisputed that the invoicing took place in the U.S. after importation, which, as indicated, presents the same entry-sale disconnect normally associated with CEP sales. With respect to the second factor, the record shows that Corus uses a U.S.-based entity to facilitate these sales. This is particularly so in reference to the JIT inventory that Corus maintains in the U. S. for certain customers. Corus's U.S.-based affiliate, Corus Steel USA Inc. ("CSUSA") serves as a "facilitator, communications link and processor of certain documentation for [Corus's] U.S. imports and sales. CSUSA never takes title to, takes possession of, or resells Corus' steel and does not possess negotiating authority over steel manufactured by [Corus]." *See Corus Resp. to Commerce Antidumping Duty Questionnaire* (Jan. 30, 2003), at A-16, P.R. Doc. 13, Pl.'s App., Tab 7, at 3.

Although CSUSA neither takes ownership of the steel nor becomes involved in the contracting process, it appears that these sales could not be executed without CSUSA. Thus, because these sales (1) were at least finalized in the U.S. post-

---

[19] Corus also argues that because the sales were "agreed to" in the Netherlands before importation, they were EP sales. The definitions of both CEP and EP include the phrase "first sold (or agreed to be sold)." 19 U.S.C. § 1677a(a), (b).

importation, and (2) were "facilitated" by a U.S.-based affiliate, it was understandable that Commerce selected them using the same basis that it used to select CEP sales..

Finally, Corus could point to no distortion caused by this manner of selection. Commerce, while not treating the sales as CEP sales for other purposes, selected the "post-importation" EP sales for review based on a CEP sales date methodology because such sales had earmarks of CEP sales and posed the same difficulty when trying to connect them to earlier entry dates. Therefore, Commerce's selection of Corus's "post-importation" EP sales on the same basis as its CEP sales is reasonable.

CONCLUSION

Because Commerce's use of zeroing, and its methodology for selecting sales used in the margin calculation are reasonable and in accordance with the law, Corus's Motion for Judgment on the Agency Record is denied, and Commerce's Final Results are sustained.

/s/ Jane A. Restani
JANE A. RESTANI
CHIEF JUDGE

Dated: New York, New York
This 19th day of July, 2005

APPENDIX C

DEPARTMENT OF COMMERCE

International Trade Administration

[A-421-807]

Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands; Amended Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of amended final results of antidumping duty administrative review.

SUMMARY: On June 16, 2004, the Department of Commerce (the Department) published in the Federal Register its notice of final results of the antidumping duty administrative review of certain hot-rolled carbon steel flat products from the Netherlands for the period May 3, 2001 through October 31, 2002. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 69 FR 33630 (June 16, 2004). On June 15, 2004, in accordance with 19 CFR 351.224(c)(2), we received a timely-filed ministerial error allegation from respondent, Corus Staal BV (Corus).[1] We did not receive ministerial error allegations from petitioners.[2] Based on our analysis of Corus' ministerial error allegation, the Department has revised the antidumping duty margin for Corus. Accordingly, we are amending our final results.

---

[1] We released disclosure documents to respondent and petitioners on June 9, 2004, thereby making June 14, 2004 the deadline for submitting ministerial error comments. However, in response to a request by respondent, we extended the deadline by one day, until June 15, 2004.

[2] Petitioners are United States Steel Corporation and Nucor Corporation.

EFFECTIVE DATE: July 22, 2004.

FOR FURTHER INFORMATION CONTACT:

Deborah Scott or Robert James, Antidumping and Countervailing Duty Enforcement Group III, Office Eight, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482-2657 or (202) 482-0649, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Review

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this review. Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for

motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

• Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, e.g., ASTM specifications A543, A387, A514, A517, A506).

• Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher. sbull; Ball bearings steels, as defined in the HTS. sbull; Tool steels, as defined in the HTS.

• Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent. sbull; ASTM specifications A710 and A736. sbull; USS Abrasion-resistant steels (USS AR 400, USS AR 500).

• All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).

• Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by this order, including: Vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the scope of this order is dispositive.

Amended Final Results of Review

On June 15, 2004, Corus timely filed, pursuant to 19 CFR 351.224(c)(2), an allegation that the Department made one ministerial error in its final results. For EP transactions with a sale date (*i.e.*, invoice date) prior to importation, Corus states the Department used date of entry to select the transactions used in its analysis. Corus alleges that for these transactions, the Department erred by using the entry date for purposes of currency conversions rather than date of sale. Therefore, Corus requests that the Department correct this error by using date of sale for currency conversions for those EP transactions with a sale date prior to importation. Petitioners submitted no rebuttal comments to this ministerial error allegation.

We agree with Corus. The Tariff Act of 1930, as amended (the Tariff Act), as well as the Department's regulations, define a ministerial error as one involving "addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the Secretary considers ministerial." *See* section 751(h) of the Tariff Act and 19 CFR 351.224(f). The Department's regulations also provide that "[i]n an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of the subject merchandise." *See* 19 CFR 351.415(a). For purposes of our analysis, in utilizing entry date to select EP sales with a sale date prior to importation, we unintentionally set date of sale equal to entry date for those transactions. Because invoice date should have been used as date of sale for those transactions for purposes of currency conversions, we have corrected this inadvertent error by using date of sale for purposes of currency conversions. See lines 2601, 2608, and 2901 of the amended U.S. sales program.

In accordance with 19 CFR 351.224(e), we have amended the final results of the 2001-2002 antidumping duty administrative review of certain hot-rolled carbon steel flat products from the Netherlands, as noted above. As a result of this correction, Corus' margin decreased from 4.94 percent to 4.80 percent *ad valorem*.

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. As a result of the Court of International Trade's decision in *Corus Staal BV et al. v. United States*, Consol. Court No. 02-00003, Slip Op. 03-127 (CIT September 29, 2003), we will not assess duties on merchandise that entered between October 30, 2001 and November 28, 2001, inclusive. For more information, *see Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands: Notice of Final Court Decision and Suspension of Liquidation*, 68 FR 60912 (October 24, 2003). Thus, in accordance with 19 CFR 351.212(b)(1), we will calculate an importer-specific *ad valorem* assessment rate for merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. Where the importer-specific assessment rate is above *de minimis*, we will instruct CBP to assess duties on all appropriate entries of subject merchandise by that importer. This rate will be assessed uniformly on all entries of that particular importer made during the periods May 3, 2001 through October 29, 2001 and November 29, 2001 through October 31, 2002. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review.

The amended cash deposit requirement is effective for all shipments of subject merchandise manufactured by Corus entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice and shall remain

in effect until publication of the final results of the next administrative review.

These amended final results are issued and published in accordance with section 751(h) of the Tariff Act and 19 CFR 351.224.

Dated: July 14, 2004.

James J. Jochum,
Assistant Secretary for Import Administration.

[FR Doc. 04-16743 Filed 7-21-04; 8:45 am]

APPENDIX D

DEPARTMENT OF COMMERCE

International Trade Administration

[A-421-807]

Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review of certain hot-rolled carbon steel flat products from the Netherlands.

SUMMARY: On December 8, 2003, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 68341 (December 8, 2003) (*Preliminary Results*). This review covers imports of subject merchandise from Corus Staal BV (Corus Staal) to the United States during the period May 3, 2001 to October 31, 2002. Based on our analysis of the comments received, we have made changes to the margin calculation. Therefore, the final results differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of Review."

DATES: *Effective Date*: July 16, 2004.

FOR FURTHER INFORMATION CONTACT:

Deborah Scott or Robert James, AD/CVD Enforcement, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and

Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482-2657 or (202) 482- 0649, respectively.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 2003, the Department published in the Federal Register the *Preliminary Results* of the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands for the period May 3, 2001 to October 31, 2002. In response to the Department's invitation to comment on the preliminary results of this review, Corus (respondent) and United States Steel Corporation (USSC) and Nucor Corporation (Nucor) (collectively, petitioners) filed their case briefs on January 14, 2004. Corus, USSC, and Nucor submitted rebuttal briefs on January 23, 2004. On February 12, 2004, we published in the Federal Register our notice of the extension of time limits for this review. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Antidumping Duty Administrative Review; Extension of Time Limit*, 69 FR 6939 (February 12, 2004). This extension established the deadline for this final as June 5, 2004. Since this date falls on a Saturday, i.e., a non-business day, the signature date for this final is June 7, 2004.

Period of Review

The period of review (POR) is May 3, 2001 to October 31, 2002.

Scope of the Review

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less

than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (i.e., flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of this review. Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or

0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

• Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.*, ASTM specifications A543, A387, A514, A517, A506).

• Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher.

• Ball bearings steels, as defined in the HTS.

• Tool steels, as defined in the HTS.

• Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.

• ASTM specifications A710 and A736.

• USS Abrasion-resistant steels (USS AR 400, USS AR 500).

• All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).

• Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30,

7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by this order, including: vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) from Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated June 7, 2004, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099, of the main Department building. In addition, a complete version of the Decision Memorandum

can be accessed directly via the Internet at *http://www.ia.ita.doc.gov*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

• We have modified the weighting factor for the quality field in our model match hierarchy so that it consists of two digits rather than one.

• We have excluded entries which occurred between October 30, 2001 and November 28, 2001, inclusive ("gap period"), from the calculation of the dumping margin. We have also revised the calculation of the assessment rate to exclude the gap period entries from the numerator.[1]

• We have amended our margin calculation program so that for sales which occurred prior to importation, the entry date was used to define the transactions used in our analysis.

• We have revised the adjustment made to the cost of manufacturing for the unexplained difference found in Corus' cost reconciliation. The difference in the reconciliation was due to both a change in finished goods inventory and a small unexplained difference in the cost reconciliation. We have continued to adjust the cost of manufacture for the change in finished goods inventory but have no longer adjusted for the minor unexplained difference in the cost reconciliation.

• We have amended our calculation of variable costs of manufacture (VCOMH/U) to reflect the revised startup costs (RSTARTUP).

---

[1] We note that gap period entries had already been excluded from the denominator of the assessment rate for the preliminary results, and continue to be excluded from the denominator of the assessment rate for the final results.

These changes are discussed in the relevant sections of the Decision Memorandum.

Final Results of Review

We determine that the following weighted-average percentage margin exists for the period May 3, 2001 to October 31, 2002:

Manufacturer/exporter	Weighted average percentage margin
Corus	4.94

Assessment

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. As a result of the Court of International Trade's decision in *Corus Staal BV et al. v. United States*, Consol. Court No. 02- 00003, Slip Op. 03-127 (CIT September 29, 2003), we will not assess duties on merchandise that entered between October 30, 2001 and November 28, 2001, inclusive. For more information, *see Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands: Notice of Final Court Decision and Suspension of Liquidation*, 68 FR 60912 (October 24, 2003). Thus, in accordance with 19 CFR 351.212(b)(1), we will calculate an importer-specific *ad valorem* assessment rate for merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR[2] to the total

[2] Since we have not included entries which occurred between October 30, 2001 and November 28, 2001 in the calculation of the dumping margin (*see* "Changes Since the Preliminary Results"), the "total amount of antidumping duties calculated for the examined sales made during the

customs value of the sales used to calculate those duties. Where the importer-specific assessment rate is above *de minimis*, we will instruct CBP to assess duties on all appropriate entries of subject merchandise by that importer. This rate will be assessed uniformly on all entries of that particular importer made during the periods May 3, 2001 through October 29, 2001 and November 29, 2001 through October 31, 2002. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of these final results for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for the reviewed company will be the rate listed above; (2) if the exporter is not a firm covered in this review, a prior review, or the original less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (3) the cash deposit rate for all other manufacturers or exporters will continue to be the "all others" rate of 2.59 percent, which is the "All Others" rate established in the LTFV investigation. *See Notice of Amended Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 FR 55637 (November 2, 2001). These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

POR" does not include sales of merchandise which entered during that same period.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305, that continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act.

Dated: June 7, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

Comment 1. Conventional Hot-Rolled Material vs. Direct Sheet Product

Comment 2. Quality Code

Comment 3. Treatment of Section 201 Tariffs

Comment 4. Treatment of Non-dumped Sales

Comment 5. Gap Period Entries

Comment 6. Cost of Manufacturing

Comment 7. General Expense Ratio

Comment 8. Variable Cost of Manufacturing

Comment 9. CEP Profit Rate

Comment 10. Use of Sale Date vs. Entry Date to Identify EP Sales

Comment 11. Reporting Period for U.S. Sales

[FR Doc. 04-13495 Filed 6-15-04; 8:45 am]

APPENDIX E

Statutory Citations to be included at end of Corus Appendix

19 U.S.C. § 3533 provides:

Dispute settlement panels and procedures

(a) Review by President

The President shall review annually the WTO panel roster and shall include the panel roster and the list of persons serving on the Appellate Body in the annual report submitted by the President under section 2213(a) of this title.

(b) Qualifications of appointees to panels

The Trade Representative shall—

(1) seek to ensure that persons appointed to the WTO panel roster are well-qualified, and that the roster includes persons with expertise in the subject areas covered by the Uruguay Round Agreements; and

(2) inform the President of persons nominated to the roster by other WTO member countries.

(c) Rules governing conflicts of interest

The Trade Representative shall seek the establishment by the General Council and the Dispute Settlement Body of rules governing conflicts of interest by persons serving on panels and members of the Appellate Body and shall describe, in the annual report submitted under section 3534 of this title, any progress made in establishing such rules.

(d) Notification of disputes

Promptly after a dispute settlement panel is established to consider the consistency of Federal or State law with any of the Uruguay Round Agreements, the Trade Representative shall notify the appropriate congressional committees of—

(1) the nature of the dispute, including the matters set forth in the request for the establishment of the panel, the legal basis of the complaint, and the specific measures, in particular any State or Federal law cited in the request for establishment of the panel;

(2) the identity of the persons serving on the panel; and

(3) whether there was any departure from the rule of consensus with respect to the selection of persons to serve on the panel.

(e) Notice of appeals of panel reports

If an appeal is taken of a report of a panel in a proceeding described in subsection (d) of this section, the Trade Representative shall, promptly after the notice of appeal is filed, notify the appropriate congressional committees of—

(1) the issues under appeal; and

(2) the identity of the persons serving on the Appellate Body who are reviewing the report of the panel.

(f) Actions upon circulation of reports

Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d) of this section, the Trade Representative shall—

(1) notify the appropriate congressional committees of the report;

(2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and

(3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation

and, if so, the manner of such implementation and the period of time needed for such implementation.

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

(2) Effective date of modification

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

(3) Vote by congressional committees

During the 60-day period described in paragraph (2), the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification. Any such vote shall not be binding on the department or agency which is implementing the rule or other modification.

(4) Inapplicability to ITC

This subsection does not apply to any regulation or practice of the International Trade Commission.

(h) Consultations regarding review of WTO rules and procedures

Before the review is conducted of the dispute settlement rules and procedures of the WTO that is provided for in the Decision on the Application of the Understanding on Rules and Procedures Governing the Settlement of Disputes, as such decision is set forth in the Ministerial Declarations and Decisions adopted on April 15, 1994, together with the Uruguay Round Agreements, the Trade Representative shall consult with the congressional committees regarding the policy of the United States concerning the review.

19 U.S.C. § 3538 provides:

Administrative action following WTO panel reports

(a) Action by United States International Trade Commission

(1) Advisory report

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

(2) Time limits for report

The Commission shall transmit its report under paragraph (1) to the Trade Representative—

(A) in the case of an interim report described in paragraph (1), within 30 calendar days after the Trade Representative requests the report; and

(B) in the case of a report of the Appellate Body, within 21 calendar days after the Trade Representative requests the report.

(3) Consultations on request for Commission determination

If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade Representative shall consult with the congressional committees concerning the matter.

(4) Commission determination

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

(5) Consultations on implementation of Commission determination

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) Revocation of order

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering

authority to revoke the antidumping or countervailing duty order in whole or in part.

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to

implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

(2) Notice of implementation

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.].

(B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.].

(d) Opportunity for comment by interested parties

Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

05-1600

CORUS STAAL BV,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

Appeal from the United States Court of International Trade in case no. 04-00316, Chief Judge Jane A. Restani.

PETITION FOR REHEARING EN BANC BY PLAINTIFF-APPELLANT CORUS STAAL BV

RICHARD O. CUNNINGHAM
JOEL D. KAUFMAN
ALICE A. KIPEL
JAMIE B. BEABER

STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6288

Counsel for Plaintiff-Appellant
Corus Staal BV

July 28, 2006

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CORUS STAAL BY v US, 05-1600

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Corus Staal BY certifies the following:

1. The full name of every party or amicus represented by me is:

Corus Staal,

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Corus Nederland BV (formerly Koninklijke Hoogovens NV), which in turn is 100% owned by Corus Group plc, a publicly owned and traded company on the British stock market.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Richard 0. Cunningham, Esq., Alice A. Kipel, Esq., and Joel D. Kaufman, Esq. of the law firm of Steptoe & Johnson LLP, and Troy H. Cribb, Esq., formerly of the law firm of Steptoe & Johnson LLP, represented the Appellant at the Court of International Trade. Mr. Cunningham, Ms. Kipel and Mr. Kaufman, as well as

Jamie B. Beaber, Esq., also of Steptoe & Johnson LLP, are expected to appear in this proceeding.

July 28, 2006

/s/ Joel D. Kaufman
JOEL D. KAUFMAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-6288

Counsel for Plaintiff-Appellant
Corus Staal BV

TABLE OF CONTENTS

	Page
STATEMENT OF COUNSEL IN SUPPORT OF REHEARING EN BANC	1
I. POINTS OF LAW OR FACT THAT WERE OVERLOOKED OR MISAPPREHENDED	3
II. ARGUMENT IN SUPPORT OF REHEARING EN	5
A. The Panel Misapprehended or Ignored the Significance of Commerce's Proposed Change in Zeroing Policy	
B. Commerce's Decision To Abandon the Zeroing Methodology that Produced the Antidumping Order on Which the Authority for the Appealed Administrative Review Rests Requires a Remand	7
C. The Change in Methodology Proposed by Commerce Will Be Applied to the Investigation and Order in this Proceeding	12
D. The Panel Misapprehended this Court's Mandate that Implementation of WTO Decisions Must Be Left Exclusively to the Executive Branch	13
III. CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Corus Staal BV v. Dept of Commerce, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) ..... *passim*

Nat'l Fuel Gas Supply Corp. v. FERC, 899 F.2d 1244 (D.C. Cir. 1990) 8

NLRB v. Food Store Employees Union. Local 347, 417 U.S. 1 (1974) 1, 4, 8

Panhandle E. Pipeline Co. v. FERC, 890 F.2d 435 (D.C. Cir. 1989) 1, 7-8

PS Chez Sidney, L.L.C. v. United States Intl Trade Comm'n, Slip Op. 06-103 (CIT July 13, 2006) 10

Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004) 5

WTO DISPUTE SETTLEMENT DOCUMENTS

Panel Report, United States Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/R (Oct. 31, 2005), as amended by Appellate Body Report, WT/DS294/AB/R (Apr. 18, 2006) ..... *passim*

Second Written Submission of the United States, United States—Section 129(c)(1) of the Uruguay Round Agreements Act WT/DS221, 19 (Mar. 8, 2002), available at http://www.ustr.govrrrade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Concluded.html 11

United States—Laws Regulations and Methodology for Calculating Dumping Margins, Communication by the United States ¶ 12 (May 30, 2006), updated version available at http://www.wto.orgienglishitratop_e/disp_eicases_eids294_e.htm 6, 10

TABLE OF AUTHORITIES

DEPARTMENT OF COMMERCE PROCEEDINGS Page

Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an, Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Dep't Commerce Mar. 6, 2006)... 8

Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada, 70 Fed Reg. 22,636 (Dep't Commerce May 2, 2005)..... 9-10

Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37,125 (Dep't Commerce June 23, 2003)..... 13

Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures Concerning Certain Steel Products from the European Communities, 68 Fed. Reg. 64,858, 64,858 (Dep't Commerce Nov. 17, 2003)..... 13

STATUTES

19 U.S.C. § 1673b(b)(3) (2000) 9
19 U.S.C. § 3533(g) (2000) 13
19 U.S.C. § 3538(c)(1) (2000)..... 13

WTO AGREEMENTS

WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 21, para. 1 ..... 6-7, 14

RULES

F.R.A.P. 35 3
F.R.A.P. 40 3

TABLE OF AUTHORITIES

MISCELLANEOUS — Page

Press Release, *U.S. Mission to the United Nations, U.S. Statement at the WTO Dispute Settlement Body Meeting* (May 30, 2006), available at http://www.us-mission.chiPress 2006/0531DSahtml 6

STATEMENT OF COUNSEL IN SUPPORT OF REHEARING EN BANC

Based on my professional judgment, I believe that the panel decision in *Corus Staal BV v. United States*, Appeal No. 05-1600, is contrary to the following decisions of the U.S. Supreme Court and the precedents of this and other courts of appeal: *NLRB v. Food Store Employees Union Local 347*, 417 U.S. 1 (1974) ("*Food Store Employees*"); *Panhandle E. Pipeline Co. v. FERQ*, 890 F.2d 435 (D.C. Cir. 1989)("*Panhandle E. Pipeline Co.*"); and *Corus Staal BV v. Dept of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) ("*Corus Staal I*").

In addition, based on my professional judgment, I believe this appeal requires an answer to precedent-setting questions that are of exceptional importance because they involve action by the Court in an area that this Court itself has determined to be "the exclusive province" of the Executive Branch:

(1) May the Court ignore the intervening change in zeroing policy by the U.S. Department of Commerce ("Commerce"), without remanding to permit Commerce to determine whether that change in policy, in conjunction with Commerce's ongoing implementation of the decision as to this antidumping proceeding by the World Trade Organization ("WTO") in *US-Zeroing*,[1] will require reversal of the administrative review decision that is the subject of this appeal; and

(2) May the Court reach a decision, without first remanding to the administrative agency, on issues that are the subject of a WTO decision and as to which not only has the United States announced its intention to implement the WTO de-

---

[1] Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R (Oct. 31, 2005)("*Panel Report*"), *as amended by* Appellate Body Report, WT/DS294/AB/R (Apr. 18, 2006) ("*US-Zeroing*").

cision in the antidumping proceeding that is before the Court but as to which Commerce has commenced a proceeding to change its practice to conform to that WTO decision.

/s/ Richard O. Cunningham
RICHARD O. CUNNINGHAM
Attorney of Record for
Corus Staal BV

PETITION FOR REHEARING EN BANC

The instant petition for rehearing en banc is submitted on behalf of Corus Staal BV ("Corus"), pursuant to F.R.A.P. 35 and 40 and the parallel Rules of this Court, seeking rehearing en banc of this Court's decision in *Corus Staal BV v. United States*, Appeal No. 05-1600 (entry of judgment dated June 13, 2006) ("Corus Staal II").

I. POINTS OF LAW OR FACT THAT WERE OVERLOOKED OR MISAPPREHENDED,

Corus respectfully submits that the Court misapprehended three key points:

1. The Court either did not consider or misapprehended the fact that Commerce has announced that it will abandon the antidumping margin computation methodology (zeroing in average-to-average price comparisons) on which the antidumping order depends, which order constitutes the sole legal authority for conducting the administrative review that is the subject of this appeal. Such an intervening change in Commerce's interpretation of law requires that this Court remand to Commerce to permit the agency to decide in the first instance the effect of that change on Commerce's decision in the administrative review herein at issue.

2. The Court either misapprehended or did not consider the fact that the aforesaid proposed change in methodology was announced by Commerce as the first step in its im-

plementation of the decision in *US-Zeroing*, which found that the antidumping orders in 15 specific antidumping investigations—including the order that constitutes the authority for the administrative review determination that is the subject of this appeal—were based on a margin calculation methodology that is inconsistent with U.S. obligations under the WTO Agreement on Antidumping. This means that the new computation methodology is intended to be applied to a modification or revocation of the order that provides authority for the administrative review determination challenged herein. Accordingly, pursuant to the rule of law stated in *Food Store Employees*, it is incumbent upon this Court to remand to Commerce to permit the agency to decide in the first instance:

(a) whether application of the new computation methodology to the antidumping investigation upon which this order is based will require a determination that the order is invalid, and

(b) whether, if the order is revoked as invalid, active administrative review determinations made under the authority of that order (including the review determination that is the subject of this appeal) must be revoked.

According to representations made by the United States to the WTO, the effect of the WTO decision in *US-Zeroing* will be the revocation of the order and, upon such revocation, Commerce will have to address the question whether in this review, duties may be assessed pursuant to an order revoked as WTO-inconsistent.

3. The Court either did not consider or misapprehended the fact that the United States has not only committed to the WTO to implement *US-Zeroing* both as to the validity of this antidumping order and as to duty assessment instructions issued with respect to entries of this merchandise, but that it

has also declared its intention to abandon the computation methodology on which the order was based. Thus, this implementation process has reached the point where this Court, pursuant to *Corus Staal I*, must remand to Commerce for resolution of issues that are in the exclusive province of the Executive Branch.

II. ARGUMENT IN SUPPORT OF REHEARING EN BANC

A. The Panel Misapprehended or Ignored the Significance of Commerce's Proposed Change in Zeroing Policy

In its briefs and argumentation to the Panel, Corus presented two arguments. Only one of those arguments is presented as the basis for reconsideration, because the Panel apparently misapprehended or ignored it and focused entirely on the other argument.

This motion for reconsideration does not address the issue of whether, in assessing the reasonableness of Commerce's practice of zeroing in the computation of dumping duties in administrative reviews,[2] the Court should weigh Commerce's justifications for that interpretation against the now-settled view of the WTO that zeroing is inconsistent with the obligations of the United States under the WTO Agreement on Antidumping. Although the WTO Appellate Body has ruled in *US-Zeroing*, as to 16 different U.S. administrative reviews, that the U.S. practice of zeroing in the computation of antidumping duties is impermissible, the Panel appears to have felt bound by its view that this Court's decision in *Corus Staal I* precludes any consideration of the substance of a WTO decision until the United States has completed im-

[2] U.S. courts have consistently held that zeroing is not required by U.S. law, but is at most a reasonable interpretation of law that is within the discretion of Commerce. *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert. denied*, 543 U.S. 976 (2004).

plementation of that decision.[3] Corus continues to believe that a commitment by the United States to implement a WTO decision, which was given "without conditions" by the United States on May 30, 2006 with regard to the *US-Zeroing* ruling that zeroing in the challenged administrative reviews was WTO-inconsistent, must be considered as "adoption" of the WTO decision within the meaning of *Corus Staal I*,[4] and invites the Court to so hold. However, the focus of this Petition is on the implications for this appeal of Commerce's already-announced decision to abandon the zeroing methodology used in the investigation that gave rise to the antidumping order on which the appealed administrative review determination depends for authority.

B. Commerce's Decision To Abandon the Zeroing Methodology that Produced the Antidumping Order on Which the Authority for the Appealed Administrative Review Rests Requires a Remand

If, during the pendency of an appeal, an agency changes or revises a legal norm or policy pertinent to the issue or issues on appeal, the appellate court is required by law to remand the proceeding to the agency. *See Panhandle E. Pipeline Co.*, 890 F.2d at 438-39.

---

[3] In *Corus Staal I*, this Court held that: "We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO . . . unless and until such ruling has been adopted pursuant to the specified statutory scheme." 395 F.3d at 1349.

[4] *See* Press Release, U.S. Mission to the United Nations, *U.S. Statement at the. WTO Dispute Settlement Body Meeting* (May 30, 2006), *available at* http://www.us-mission.ch/Press2006/0531DSBItml; *see also United States—Laws, Regulations and Methodology in Margins*, Communication by the United States ¶ 12 (May 30, 2006) ("U.S. Comunication"). "Implementation" means "[p]rompt compliance with recommendations or rulings of the DSB." WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 21, para. 1 ("WTO Dispute Settlement Understanding").

In such circumstance, the appellate court is at liberty neither to evaluate the agency's decision under the agency's "*old* policy" nor to assess on its own how the pending issue would be resolved under the agency's "*new* policy." Rather, the appellate court is "required to remand so that the [agency] may indicate how, if at all, its decision would be affected by its intervening policy change." *Id.* at 439. Indeed, in this respect, the Supreme Court has held that, "[a]ppellate courts ordinarily apply the law in effect at the time of the appellate decision. However, a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act."[5] Moreover, an appellate court should decline to resolve inconsistencies regarding a signaled change in policy by substituting the agency counsel's rationale for that of the agency. *Food Store Employees*, 417 U.S. at 9. "The integrity of the administrative process demands no less than that the [agency], not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." *Id.*

The situation discussed in *Panhandle E. Pipeline* and in *Food Store Employees* is precisely the situation presented here. On March 6, 2006, Commerce announced its intention to abandon the use of zeroing in the average-to-average method of computing antidumping margins in antidumping investigations.[6] This was the method used to determine that an antidumping margin of 2.59% existed for Corus' exports in the investigation. That margin resulted in the order on

---

[5] *Food Store Employees*, 417 U.S. at 10; *see also Panhandle E. Pipe Line Co.*, 890 F.2d at 439 n.10; *Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249 (D.C. Cir. 1990).

[6] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't Commerce Mar. 6, 2006).

which authority for the conduct of the appealed administrative review rests.[7] It is undisputed that use of a non-zeroed method of price comparison in that investigation would not have yielded a positive dumping margin. Accordingly, the effect of this change in computation policy may be to invalidate the antidumping order and the appealed review, and thus to require the rescission of the appealed review determination and the refund of Corus' cash deposits.

Whether this is in fact the effect of the new Commerce policy depends on the resolution of at least two issues that Commerce, not this Court, must address. As to both of those issues, however, previous Commerce pronouncements indicate that the issue will be resolved in such a manner as to require that the appealed review determination be revoked:

The change in computation olic will require revocation of this antidumping order. As stated above, it is undisputed that a non-zeroed margin computation cannot yield a non-*de minimis* dumping margin in the investigation concerning Corus' imports. Accordingly, this order can be sustained only if, after abandoning the methodology of zeroing in the average-to-average comparison methodology, Commerce applies another zeroed methodology.[8] In conjunction with its May 30, 2006 declaration to the WTO Dispute Settlement Body of intention to implement, without conditions, the *US-Zeroing* decision, the United States circulated a paper setting

---

[7] At 2,59%, Corus' margin was barely above the statutory definition of de minimis of 2.0% in investigations. 19 U.S.C. § 1673b(b)(3) (2000).

[8] In a decision predating *U.S.-Zeroing* that is currently being challenged at the WTO, Commerce did change to another zeroed methodology in *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce May 2, 2005).

forth its understanding of that decision.[9] In that paper, the United States stated very clearly its understanding that *US-Zeroing* had adopted a rationale under which zeroing would be found impermissible in any antidumping margin computation methodology.[10] Based upon this interpretation of what is necessary to comply with *US-Zeroing*, Commerce will have to utilize non-zeroed methodologies in antidumping investigations. Consistent with that conclusion, Commerce has already announced the abandonment of the zeroing methodology in order to comply with US-Zeroing. Use of a non-zeroed methodology in the present case will require revocation of the antidumping order.

Revocation of the order in this case will require revocation of the appealed annual. review determination. In a previous WTO dispute settlement proceeding, the United States took a clear position on the question of whether revocation of a U.S. antidumping order (through implementation of an adverse WTO determination) would also require a decision by Commerce as to whether duties may continue to be assessed on imports entered before such order revocation, or whether the invalidity of the order would require the revocation of active review determinations. In such a circumstance, the United States represented, "[i]n any subsequent administrative review, Commerce would need to decide what to do with

---

[9] U.S. Communication, *supra* note 4 With minor revisions, the May 30 document informally circulated to the members was submitted to the WTO on June 12, Paragraph 12 was identical in both versions. The May 30 version was submitted to the Court on June 5, 2006, in Corus' Notice of Supplemental Authorities. The June 12 version can be found on the WTO website at http://www.wto.orgjenglish/tratop_eidispu eicaseseids 294e.htm.

[10] *Id.* para. 12. The Court of International Trade has recently recognized that, "[w]hile WTO proceedings are neither binding upon nor dispositive for this court, positions taken by the United States . . . are relevant evidence of facts." *PS Chez Sidney, L.L.C. v. United States Intl Trade Comm'n*, Slip Op. 06-103, at 8 n.10 (CIT July 13, 2006).

entries that took place prior to the date of revocation."[11] Commerce thus "would need to decide" that issue in the administrative review that is the subject of this appeal, and the Court must remand for that purpose.

The point, of course, is not that Commerce is legally bound to resolve these issues in the manner consistent with its representations to the WTO. Rather, the point is that these are clearly—and acknowledged by Commerce to be—issues posed for decision by Commerce as a result of its announced abandonment of the price comparison methodology that resulted in the order in this proceeding. Thus, a remand is required,

C. The Change in Methodology Proposed by Commerce Will Be Applied to the Investigation and Order in this Proceeding

Corus anticipates that the appellees herein may point to the language in Commerce's notice of proposed methodology change stating that the new methodology will be applied in investigations initiated on the basis of petitions received on or after the first day of the month following the publication of the new methodology. Therefore, they will say, this change in policy will not apply to this proceeding. That argument ignores two facts:

First, the final determination of which investigations will be subject to this new methodology is one of the determinations Commerce still must make as part of the current process begun on March 6, 2006.

---

[11] Second Written Submission of the United States, United States—Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS22 ¶ 19, at 7 (Mar. 8, 2002), available at http://www.ustr.gov/Trade_Agreements/MonitoringEnforcement/Dispute_Settlement/WTO/Dispute_Settlementindex-_Concluded.html.

Second, and more importantly, the change of methodology proceeding is the first step in determining what new methodology will be used in bringing the investigation determination and order in this case (along with 14 other U.S. investigations) into compliance with the "as applied" and "as such" decisions rendered in *US-Zeroing*. In such circumstances, as in several prior cases in which the WTO rendered one or more "as applied" decisions as to specific cases, but where the decision also implicated a methodology used by Commerce in most or all cases,[12] Commerce first initiated a Section 123 proceeding[13] to determine the appropriate new methodology, then instituted one or more Section 129 proceedings[14] to apply that new policy to the specific cases that were the subject of the WTO "as applied" decisions. Thus, the policy change announced here will be applied to the investigation results on which the appealed review determination rests.

D. The Panel Misapprehended this Court's Mandate that Implementation of WTO Decisions Must Be Left Exclusively to the Executive Branch

In *Corus Staal I*, this Court said:

> Congress . . . has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to

---

[12] *See, e.g., Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures Concerning Certain Steel Products from the European Communities*, 68 Fed. Reg. 64,858, 64,858 (Dep't Commerce Nov. 17, 2003) (*citing Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed, Reg. 37,125 (Dep't Commerce June 23, 2003)).

[13] 19 U.S.C. § 3533(g) (2000).

[14] 19 U.S.C. § 3538(c)(1) (2000).

> implement WTO reports and determinations and, if so implemented, the extent of implementation.
>
> ....
>
> We will not attempt to perform duties that fall within the exclusive province of the political branches . . .[15]

For the same reasons that the courts could not, prior to an implementation decision, intrude upon Commerce's interpretation because of the pendency of the Executive Branch's implementation process, the Court must here defer to the Executive Branch in any continuing legal proceeding whose result would be affected by the decisions made in implementation. In Corus' view, this obligation to defer (by remand to the agency) should be deemed to arise as soon as the United States commits to implement a WTO decision.[16] At that point, in an "as applied" case, the decisions concerning how to bring the measure subject to the WTO decision[17] into compliance with that decision "fall within the exclusive province of the political branches."[18]

The Panel here seemed to be of the view that Corus' argument in this regard turns on the date of *completion* of implementation. While it may be logical, on the facts presented in *Corus Staal I*, that the courts' preclusion from invoking a WTO decision continues until the end of implementation, that logic does not apply to the facts hereto

---

[15] 395 F.3d at 1349.

[16] "Implementation" means "[p]rompt compliance with recommendations or rulings of the DSB." WTO Dispute Settlement Understanding, Art. 21, para. 1.

[17] Here, the "measure" as to which the United States has committed to implementation is not merely the antidumping order, but also the "duty assessment instructions related thereto" *Panel Report* para. 2.6. Duty assessment instructions come into play in administrative reviews.

[18] *Corus Staal I*, 395 F.3d at 1149.

presented. Where the implementation involves an adverse "as applied" decision implicating the very antidumping duty order before the Court, there is no logic to maintaining that the obligation to defer (by remand) to the Executive Branch does not begin until the end of implementation. That obligation begins as soon as the implementation commitment is made. By no logic can the Court justify continuing the judicial process and thereby preventing agency action where the Executive agency has gone so far as to propose the manner of implementation.—*i.e.*, abandonment of the zeroing methodology.

III. CONCLUSION

For the foregoing reasons, the Court's decision in Corus Staal II raises the issues that are appropriate for rehearing en bane.

Respectfully submitted,

/s/ Richard O.Cunningham
RICHARD O. CUNNINGHAM
JOEL D. KAUFMAN
ALICE A. KIPEL
JAMIE B. BEABER

STEPTOE & JOHNSON LLP
1330 Connecticut Ave. N.W.
Washington, D.C. 20036
(202) 429-6434

Counsel for Plaintiff-Appellant
Corus Staal BV

ADDENDUM

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Filed JUN 13, 2006]

05-1600

CORUS STAAL BV,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

and

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of International Trade.

IN CASE NOS. 04-00316

This CAUSE having been heard and considered it is ORDERED and ADJUDGED:

AFFIRMED. *See* Fed. Cir. R. 36.

Per Curiam (RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*, and LINN, *Circuit Judge*.)

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBAIY, Clerk

CERTIFICATE OF SERVICE

I hereby certify that two copies of Plaintiff-Appellant Corus Staal BV's Petition for Rehearing En Banc were served via hand delivery (or first class mail where indicated by asterisk) on this 28th day of July, 2006, upon the following parties:

*On Behalf of the United States:
Claudia Burke, Esq,
Trial Attorney Civil Division
Commercial Litigation Branch
U.S. Department of Justice
1100 L Street, NW
Room 12112
Washington, DC 20530

On Behalf of United States Steel Corporation:
John J. Mangan, Esq.
Skadden, Arps, Slate, Meagher & Flom. LLP
1440 New York Avenue, NW
Washington, DC 20005-2111

/s/ Michael T. Gershberg
MICHAEL T. GERSHBERG

APPENDIX G

WORLD TRADE ORGANIZATION

19 February 2004

UNITED STATES–LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

Request for the Establishment of a Panel by the European Communities

Revision

The following communication, dated 16 February 2004, from the delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

---

1. Consultations

On 12 June 2003 and 8 September 2003, the European Communities requested consultations with the United States of America (the "United States") under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*AD Agreement*") with regard to the laws, regulations and methodologies for calculating dumping margins including zeroing practices[1]. Consultations were held on 17 July 2003 and 6 October 2003. They have allowed a better understanding of the respective positions of the parties, but have not led to a satisfactory resolution of the matter.

---

[1] WT/DS294/1 of 19 June 2003 and WT/DS294/1/Add.1 of 15 September 2003.

2. Summary of facts

In anti-dumping proceedings the United States uses the following methodologies to establish the dumping margin.

In original investigations, the United States identifies sub-groups of products within the product under investigation ("averaging groups") on a per model basis as well as on the basis of other criteria such as the level of trade. Within each of the averaging groups, a weighted average export price is established and compared to the corresponding weighted average normal value. The results of these comparisons on an "averaging group" basis are added up to establish the dumping margin of the product under investigation as a whole; however, in this process, any negative margins or amounts of "dumping" resulting from the comparison of weighted average normal values with weighted average export prices on an "averaging group" basis are put at zero. As a result, the United States calculates a margin and amount of dumping in excess of the actual dumping practised by the companies concerned.

In administrative review investigations, the United States determines the margin of dumping on the basis of a comparison of a weighted average normal value for each "averaging group" and individual export prices (the United States does not establish weighted average export prices in administrative review investigations). Here again, when adding up the results of the comparisons to determine the total amount or margin of dumping of the product under investigation, the United States puts at zero any negative amounts of "dumping". As a result, the United States calculates a margin of dumping and collects an amount of anti-dumping duty in excess of the actual dumping practised by the companies concerned. The United States uses this methodology systematically in all reviews including so-called newcomer review investigations (Article 9.5 of the *AD Agreement*), changed circumstances review investigations

(Article 11.2 of the *AD Agreement*) and sunset review investigations (Article 11.3 of the *AD Agreement*).

These calculation methodologies are applied pursuant, in particular, to the following United States laws, regulations, administrative procedures and measures:

— the Tariff Act of 1930, as amended (the "Act"), including the Statement of Administrative Action (the "SAA"), in particular Title VII and sections 731, 751, 771(35)(A), 771(35)(B) and 777(A)(d);

— the implementing regulation[2] of the United States Department of Commerce (the "DOC"), in particular section 351.414(c)(2); and

— the Import Administration Antidumping Manual (1997 edition) (the "IA AD Manual") including the computer program(s) to which it refers.

The calculation methodologies described above were respectively applied in the determinations of dumping by the DOC in the original investigations listed in annex I and in the final results of the anti-dumping administrative review investigations listed in annex II.

3. Claims

3.1 As such claims

The European Communities considers that the above-mentioned United States laws, regulations, administrative procedures, measures and methodologies for determining the dumping margin in original investigations and review investigations are inconsistent with several provisions of the *AD Agreement*, GATT 1994 and the Marrakesh Agreement establishing the World Trade Organization , for the following reasons:

---

[2] 19 CFR Section 351.

(a) in original investigations, the United States puts at zero the negative margins or amounts of "dumping" resulting from the comparison of weighted average normal values with weighted average export prices within the averaging groups. As a result, the United States calculates a margin and amount of dumping in excess of the actual dumping practised by the companies concerned. This constitutes a violation of:

- Articles 2.4[3] and 2.4.2[4] of the *AD Agreement* insofar as the comparison made by the United States is inconsistent with those provisions;
- Article 5.8 of the *AD Agreement* insofar as a *de minimis* dumping margin is erroneously determined to be not de minimis;
- Articles 9.1 and 9.3 of the *AD Agreement* insofar as there is as a result the imposition and collection of an anti-dumping duty in excess of the margin or amount of dumping as determined pursuant to Article 2 of the *AD Agreement*;
- Articles 1 and 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 insofar as there is as

---

[3] "A fair comparison shall be made between the export price and the normal value ."

[4] "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

a result the imposition and collection of an anti-dumping duty which is inconsistent with the *AD Agreement*; and consequently of

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement* insofar as the United States has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the *AD Agreement*.

(b) in review investigations, the United States systematically determines the margin of dumping on the basis of a comparison of a weighted average normal value and individual export prices and puts at zero the negative amounts of "dumping". As a result, the United States calculates a margin of dumping and collects an amount of anti-dumping duty in excess of the actual dumping practised by the companies concerned. This constitutes a violation of:

- Articles 2.4 and 2.4.2 of the *AD Agreement*[5] insofar as the comparison made by the United States is in consistent with those provisions;

- Articles 9.1 and 9.3 of the *AD Agreement* insofar as there is as a result the imposition and collection of an anti-dumping duty in excess of the margin of dumping determined pursuant to Article 2 of the *AD Agreement*;

- Articles 9.5 and 11 (including Articles 11.2 and 11.3) of the *AD Agreement* insofar as the determinations of dumping in review investigations contemplated by these provisions are not made in compliance with Articles 2.4 and 2.4.2 of the *AD Agreement*;

---

[5] See footnotes 3 and 4.

- Articles 1 and 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994 insofar as there is as a result the imposition and collection of an anti-dumping duty which is inconsistent with the *AD Agreement*; and consequently of

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement* insofar as the United States has not taken all necessary steps, of a general or particular character, to ensure the conformity of its laws, regulations and administrative procedures with the provisions of GATT 1994 and the *AD Agreement*.

3.2 <u>As applied claims</u>

In the specific anti-dumping proceedings annexed to the present request, the United States applied the methodologies and the laws, regulations, administrative procedures and measures described under point 2 above. In consequence, the European Communities considers that the determinations of dumping by DOC, the determinations of injury by the United States International Trade Commission, the imposition of definitive duties in the original investigations and the outcome of the administrative review investigations as detailed in the annexes are inconsistent with the *AD Agreement*, GATT 1994 and the Marrakesh Agreement establishing the World Trade Organization as follows:

(a) in the original investigations:

- Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1 and 9.3 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, for the reasons set out under point 3.1(a) above;

- Article 3, including Articles 3.1, 3.2 and 3.5, of the *AD Agreement* insofar as the volume of "dumped imports" for the injury and causality determinations is determined on the basis of margins of dumping in

excess of the actual margin of dumping of the companies concerned, with the result that imports from certain companies which should be excluded because of *de minimis* dumping margins are erroneously included in the "dumped imports"; and consequently

- Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement*, for the reasons set out under point 3.1(a) above.

(b) in the administrative review investigations: Articles 1, 2.1 2.4, 2.4.2, 9.1, 9.3, and 11 (including Article 11.2) of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, and consequently Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization and Article 18.4 of the *AD Agreement*, for the reasons set out under point 3.1(b) above.

4. Request

The European Communities hereby respectfully requests that a panel be established, with the standard terms of reference, by the Dispute Settlement Body pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of GATT 1994, and Article 17.4 the *AD Agreement*. The European Communities asks that this request be placed on the agenda of the meeting of the Dispute Settlement Body on 17 February 2004.

ANNEX I
IMPOSITION OF ANTI-DUMPING DUTY

Product	MS	DOC Case Number	DOC Final Determination	ITC Case Number	ITC Determination	AD Order
1. Certain hot-rolled carbon steel	NL	A-421-807	66 FR 50408, October 3, 2001 (amended: 66 FR 55637, November 2, 2001)	A-903	November 2001	66 FR 59565, November 29, 2001
2. Stainless steel bar	F	A-427-820	67 FR 3143, January 23, 2002	A-913	February 2002	67 FR 10385, March 7, 2002
3. Stainless steel bar	G	A-428-830	67 FR 3159, January 23, 2002 (amended: 67 FR 10382, March 7, 2002)	A-914	February 2002	67 FR 10382, March 7, 2002
4. Stainless steel bar	I	A-475-829	67 FR 3155, January 23, 2002 (amended: 67 FR 8228, February 22, 2002)	A-915	February 2002	67 FR 10384, March 7, 2002
5. Stainless steel bar	UK	A-412-822	67 FR 3146, January 23, 2002	A-918	February 2002	67 FR 10381, March 7, 2002
6. Stainless Steel Wire Rod	SW	A-401-806	63 FR40449, July 29,1998	A-774	September 1998	63 FR49329, September 15, 1998
7. Stainless Steel Wire Rod	E	A-469-807	63 FR40391, July 29,1998	A-773	September 1998	63 FR 49330, September 15, 1998
8. Stainless Steel Wire Rod	I	A-475-820	63 FR40422, July 29,1998	A-770	September 1998	63 FR 49327, September 15, 1998
9.Certain Stainless Steel Plate in Coils	B	A-423-808	64 FR15476, March 31, 1999	A-788	May 1999	64 FR 27756, May 21, 1999 (amended by 68 FR 20114 April 24, 2003)
10. Stainless Steel Sheet and Strip in Coils	F	A-427-814	64 FR30820, June 8, 1999	A-797	July 1999	64 FR 40562, July 27, 1999
11. Stainless Steel Sheet and Strip in Coils	I	A-475-824	64 FR30750, June 8, 1999	A-799	July 1999	64 FR 40567, July 27, 1999
12. Stainless Steel Sheet and Strip in Coils	UK	A-412-818	64 FR30688, June 8,1999	A-804	July 1999	64 FR 40555, July 27,1999
13. Certain Cut-to-Length Carbon-Quality Steel Plate	F	A-427-816	64 FR73143, December 29,1999	A-816	February 2000	65 FR 6585, February 10, 2000
14. Certain Cut-to-Length Carbon-Quality Steel Plate	I	A-475-826	64 FR73234, December 29,1999	A-819	February 2000	65 FR 6585, February 10, 2000

ANNEX I IMPOSITION OF ANTI-DUMPING DUTY						
Product	**MS**	**DOC Case Number**	**DOC Final Determination**	**ITC Case Number**	**ITC Determination**	**AD Order**
15. Certain Pasta	I	A-475-818	61 FR30326, June 14, 1996 (amended by 66 FR65889, December 21,2001)	A-734	July 1996	61 FR38547 July 24, 1996

United States—Anti-Dumping Duties on Imports of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

Specific Case No. 1

The measure

This case concerns the imposition of anti-dumping duties on Certain Hot-Rolled Carbon Steel Flat products from the Netherlands (US case number A-421-807, 66 FR 59565 of 29 November 2001). The rate of the *ad valorem* anti-dumping duty was 2.59% for Corus Staal BV and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 2.59% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and the case would have been terminated.

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from France

Specific Case No. 2

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from France (US case number A-427-820, 67 FR 10385 of 7 March 2002). The rates of the *ad valorem* anti-dumping duty were 71.83% for Aubert & Duval S.A, 3.90% for Ugine-Savoie Imphy and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.90% for Ugine-Savoie Imphy SA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ..%] (negative) and the case would have been terminated with respect to this exporter.

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from Germany

Specific Case No. 3

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from Germany (US case number A-428-830, 67 FR 10382 of 7 March 2002). The rates of the ad valorem anti-dumping duty were 13.63% for BGH, 4.17% for Einsal, 15.40% for EWK, 32.32% for KEP and 16.96% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin:

— of 13.63% for BGH. Without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

— of 4.17% for Einsal. Without the zeroing methodology, the dumping margin would have been of [..%] (*de minimis*) and the case would have been terminated with respect to this exporter.

— of 15.40% for EWK. Without the zeroing methodology the dumping margin would have been [..%] (lower).

— of 32.32% for KEP. Without the zeroing methodology the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from Italy

Specific Case No. 4

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from Italy (US case number A-475-

829, 67 FR 10384 of 7 March 2002). The rates of the *ad valorem* anti-dumping duty were 2.50% for Acciaierie Valbruna Srl/Acciaierie Bolzano D.p.A, 7.07% for Acciaiera Foroni SpA, 3.83% for Rodacciai S.p.A, 33% for Cogne Acciai Speciali Srl and 3.81% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin:

— of 2.50% for Acciaierie Valbruna Srl/Acciaierie Bolzano S.p.A. Without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-..%] (negative) and the case would have been terminated with respect to this exporter.

— of 7.07% for Acciaiera Foroni Spa. Without the zeroing methodology the dumping margin would have been [..%] (lower).

— of 3.83% for Rodacciai SpA. Without the zeroing methodology the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Bar from the United Kingdom

Specific Case No. 5

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Bar from the United Kingdom (US case number A-412-822, 67 FR 10381 of 7 March 2002). The rates of the ad valorem anti-dumping duty were 4.48% for Corus Engineering Steels, Ltd, 125.77% for Crownridge Stainless Steel, Ltd/Valkia Ltd and Firth Rixson Special Steels, Ltd and 4.48% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 4.48% for Corus Engineering Steels, Ltd while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and the case would have been terminated with respect to this exporter.

United States—Anti-Dumping Duties on Imports of Stainless Steel Wire Rod from Sweden

Specific Case No. 6

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Wire Rod from Sweden (US case number A-401-806, 63 FR 49329 of 15 September 1998). The rate of the *ad valorem* anti-dumping duty was 5.71% for Fagersta Stainless AB and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 5.71% for Fagersta Stainless AB while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-...%] (negative) and the case would have been terminated with respect to this exporter.

United States—Anti-Dumping Duties on Imports of Stainless Steel Wire Rod from Spain

Specific Case No. 7

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Wire Rod from Spain (US case number A-469-807, 63 FR 49330 of 15 September 1998). The rate of the ad valorem anti-dumping duty was 4.73% for Roldán SA and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 4.73% for Roldán SA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Wire Rod from Italy

Specific Case No. 8

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Wire Rod from Italy (US case number A-475-820, 63 FR 49327 of 15 September 1998). The rate of the ad valorem anti-dumping duty was 12.72% for Cogne Acciai Speciali Srl and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 12.72% for Cogne Acciai Speciali Srl while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Plate in Coils from Belgium

Specific Case No. 9

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Plate in Coils from Belgium (US case number A-423-808, 64 FR 27756 of 21 May 1999, amended by 68 FR 20114 of 24 April 2003). The rate of the *ad valorem* anti-dumping duty was 3.84% for ALZ and 9.86% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.84% for ALZ while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Sheet and Strip in Coils from France

Specific Case No. 10

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from France (US case number A-427-814, 64 FR 40562 of 27 July 1999). The rate of the *ad valorem* anti-dumping duty was 9.38% for Usinor and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 9.38% for Usinor while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Sheet and Strip in Coils from Italy

Specific Case No. 11

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from Italy (US case number A-475-824, 64 FR 40567 of 27 July 1999). The rate of the *ad valorem* anti-dumping duty was 11.23% for Acciai Spaciali Terni SpA and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 11.23% for Acciai Spaciali Terni SpA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Stainless Steel Sheet and Strip in Coils from the UK

Specific Case No. 12

The measure

This case concerns the imposition of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from the UK (US case number A-412-818, 64 FR 40555 of 27 July 1999). The rate of the *ad valorem* anti-dumping duty was 14.84% for Avesta Sheffield and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 14.84% for Avesta Sheffield while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Certain Cut-to-Length Carbon-Quality Steel Plate from France

Specific Case No. 13

The measure

This case concerns the imposition of anti-dumping duties on Certain Cut-to-Length Carbon-Quality Steel Plate from France (US case number A-427-816, 65 FR 6585 of 10 February 2000). The rate of the *ad valorem* anti-dumping duty was 10.41% for Usinor and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 10.41% for Usinor while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Duties on Imports of Certain Cut-to-Length Carbon-Quality Steel Plate from Italy

Specific Case No. 14

The measure

This case concerns the imposition of anti-dumping duties on Certain Cut-to-Length Carbon-Quality Steel Plate from Italy (US case number A-475-826, 65 FR 6585 of 10 February 2000). The rate of the *ad valorem* anti-dumping duty was 7.85% for Palini and Bertoli SpA and all others.

Dumping margin without zeroing

DOC calculated a dumping margin of 7.85% for Palini and Bertoli SpA while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

United States—Anti-Dumping Duties on Imports of Certain Pasta from Italy

Specific Case No. 15

The measure

This case concerns the imposition of anti-dumping duties on Certain Pasta from Italy (US case number A-475-818, 61 FR 38547 of 24 July 1996). The rates of the *ad valorem* anti-dumping duty were 21.34% for Italpasta, 14.78% for La Molisana, 12.41% for Liguori, 18.30% for Pagani and 12.09% for all others.

Dumping margin without zeroing

DOC calculated a dumping margin:

— of 21.34% for Italpasta. Without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [..%] (lower).

— of 14.78% for La Molisana. Without the zeroing methodology, the dumping margin would have been of [..%] (lower).

— of 12.41% for Liguori. Without the zeroing methodology the dumping margin would have been .[..%] (lower).

— of 18.30% for Pagani. Without the zeroing methodology the dumping margin would have been [..%] (lower).

ANNEX II ADMINISTRATIVE REVIEWS							
Product	MS	No Case	Final Results	Amended Final Results	Company	Dumping Margin	Period covered by the Review
16. Industrial Nitrocellulose	F	A-427-009	66 FR 54213, October 26, 2001		Bergerac NC	3.26%	1 August 99-31 July 00
17. Industrial Nitrocellulose	UK	A-412-803	67 FR 77747, December 19, 2002		Imperial Chemical Industries	3.06%	1 July 00-30 June 01
18. *Stainless steel plate in* coils	B	A-423-808	67 FR 64352, October 18, 2002		ALZ NV & TrefilARBED (affiliated US importer)	3.84%	1 May 00-30 April 01
19. Certain pasta	I	A-475-818	66 FR 300, January 3, 2002	67 FR 5088, February 4, 2002	Ferrara Pallante PAM	1.25% 1.78% 4.10%	1 July 99-30 June 00
20. Certain pasta	I	A-475-818	68 FR 6882, February 11, 2003		Pastifi Garofalo	0.55%	1 July 00-30 June 01
21. Stainless steel sheet strip coils	I	A-475-824	67 FR 1715, January 14, 2002		Acciai Speciali Terni SpA	0.66%	4 January 99-30 June 00
22. Stainless steel sheet strip coils	I	A-475-824	68 FR 6719, February 10, 2003		Acciai Speciali Terni SpA	5.84%	1 July 00-30 June 01
23. Granular polytetrafluoenthylene	I	A-475-703	67 FR 1960, January 15, 2002		Ausimont SpA	2.15%	1 August 99-31 July 00
24. Granular polytetrafluoenthylene	I	A-475-703	68 FR 2007, January 15, 2003		Ausimont SpA	12.08%	1 August 00-31 July 01
25. Stainless steel sheet strip coils	F	A-427-814	67 FR 6493, February 12, 2002	67 FR 12522, March 19, 2002	Ugine	3.00%	4 January 99-30 June 00

ANNEX II ADMINISTRATIVE REVIEWS							
Product	MS	No Case	Final Results	Amended Final Results	Company	Dumping Margin	Period covered by the Review
26. Stainless steel sheet strip coils	F	A-427-814	67 FR 78773, December 26, 2002	68 FR 4171, January 28, 2003	Ugine	1.44%	1 July 00-30 June 01
27. Stainless steel sheet strip coils	G	A-428-825	67 FR 7668, February 20, 2002	67 FR 15178, March 29, 2002	KTN	2.61%	4 January 99-30 June 00
28. Stainless steel sheet strip coils	G	A-428-825	68 FR 6716, February 10, 2003	68 FR 14193, March 24, 2003	TKN	4.74%	1 July 00-30 June 01
29. Ball bearings	F	A-427-801	67 FR 55780, August 30, 2002		SKF France SA and Sarma	8.51%	1 May 00-30 April 01
30. Ball bearings	I	A-475-801	67 FR 55780, August 30, 2002		FAG Italia SpA SKF Industrie SpA	1.42% 3.70%	1 May 00-30 April 01
31. Ball bearings	UK	A-412-801	67 FR 55780, August 30, 2002		NSK Bearings Europe Ltd The Barden Corporation UK	16.87% 3.87%	1 May 00-30 April 01

United States—Anti-Dumping Administrative Review on Imports of Industrial Nitrocellulose from France

Specific Case No. 16

The administrative review

This case concerns the administrative review of anti-dumping duties on Industrial Nitrocellulose from France, produced and exported by Bergerac NC. (US case number A-427-009, 66 FR 54213 of 26 October 2001). The period of review is 1 August 1999 through 31 July 2000 and the rate of anti-dumping duty for Bergerac NC was 3.26% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.26% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Industrial Nitrocellulose from the United Kingdom

Specific Case No. 17

The administrative review

This case concerns the administrative review of anti-dumping duties on Industrial Nitrocellulose from the United Kingdom, produced and exported by Imperial Chemical Industries PLC. (US case number A-412-803, 67 FR 77747 of 19 December 2002). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for Imperial Chemical Industries was 3.06% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.06% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Plate in Coils from Belgium

Specific Case No. 18

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Plate in Coils from Belgium, produced and exported by ALZ NV (US case number A-423-808, 67 FR 64352 of 18 October 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty for ALZ NV was 3.84% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.84% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Certain Pasta from Italy

Specific Case No. 19

The administrative review

This case concerns the administrative review of anti-dumping duties on Certain Pasta from Italy, produced and exported by Pastificio Guido Ferrara S.r.L. (Ferrara), Pastificio Antonio Pallante S.r.L. (Pallante) and PAM S.r.L. (PAM). (US case number A-475-818, 66 FR 300 of 3 January 2002, 67 FR 5088 of 4 February 2002). The period of review is 1 July 1999 through 30 June 2000 and the rate of anti-dumping duty was, *ad valorem*, 1.25% for Ferrara, 1.78% for Pallante, 4.10% for PAM.

Dumping margin without zeroing

DOC calculated for Ferrara a dumping margin of 1.25% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

As for Pallante, DOC calculated a dumping margin of 1.78%, while without the zeroing methodology (i.e. the negative unit margins included), the dumping margin would have been [...%] (lower).

As for PAM, DOC calculated a dumping margin of 4.10%, while without the zeroing methodology (i.e. the negative unit margins included), the dumping margin would have been *de minimis*.

United States—Anti-Dumping Administrative Review on Certain Pasta from Italy

Specific Case No. 20

The administrative review

This case concerns the administrative review of anti-dumping duties on Certain Pasta from Italy, produced and exported by Pastificio Garofalo S.p.A. (US case number A-475-818, 68 FR 6882 of 11 February 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty was 0.55% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 0.55% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet Strip in Coils from Italy

Specific Case No. 21

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet Strip in Coils from Italy, produced and exported by Acciai Speciali Terni SpA (US case number A-475-824, 67 FR 1715 of 14 January 2002). The period of review is 4 January 1999 through 30 June 2000 and the rate of anti-dumping duty for Acciai Speciali Terni SpA was 0.66% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 0.66% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet Strip in Coils from Italy

Specific Case No. 22

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet Strip in Coils from Italy, produced and exported by Acciai Speciali Terni SpA (US case number A-475-824, 68 FR 6719 of 10 February 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for Acciai Speciali Terni SpA was 5.84% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 5.84% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative).

United States—Anti-dumping Administrative Review on Imports of Granular Polytetrafluoroenthylene Resin from Italy

Specific Case No. 23

The administrative review

This case concerns the administrative review of anti-dumping duties on Granular Polytetrafluoroenthylene resin from Italy, produced and exported by Ausimont SpA. (US case number A-475-703, 67 FR 1960 of 15 January 2002). The period of review is 1 August 1999 through 31 July 2000 and the rate of anti-dumping duty for Ausimont SpA SA was 2.15% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 2.15% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Granular Polytetrafluoroenthylene Resin from Italy

Specific Case No. 24

The administrative review

This case concerns the administrative review of anti-dumping duties on Granular Polytetrafluoroenthylene Resin from Italy, produced and exported by Ausimont SpA. (US

case number A-475-703, 68 FR 2007 of 15 January 2003). The period of review is 1 August 2000 through 31 July 2001 and the rate of anti-dumping duty for Ausimont SpA SA was 12.08% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 12.08% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [...%] (lower).

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from France

Specific Case No. 25

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from France, produced and exported by Ugine (US case number A-427-814, 67 FR 6493 of 12 February 2002, 67 FR 12522 of 19 March 2002). The period of review is 4 January 1999 through 30 June 2000 and the rate of anti-dumping duty for Ugine was 3.00% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 3.00% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from France

Specific Case No. 26

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from France, produced and exported by Ugine SA (US case number A-427-814, 67 FR 78773 of 26 December 2002, 68 FR 4171 of 28 January 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for Ugine SA was 1.44% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 1.44% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from Germany

Specific Case No. 27

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from Germany, produced and exported by KTN (US case number A-428-825, 67 FR 7668 of 20 February 2002, 67 FR 15178 of 29 March 2002). The period of review is 4 January 1999 through 30 June 2000 and the rate of anti-dumping duty for KTN was 2.61% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 2.61% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Stainless Steel Sheet and Strip in Coils from Germany

Specific Case No. 28

The administrative review

This case concerns the administrative review of anti-dumping duties on Stainless Steel Sheet and Strip in Coils from Germany, produced and exported by TKN (US case number A-428-825, 68 FR 6716, February 10, 2003, 68 FR 14193, March 24, 2003). The period of review is 1 July 2000 through 30 June 2001 and the rate of anti-dumping duty for TKN was 4.74% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 4.74% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Ball Bearings from France

Specific Case No. 29

The administrative review

This case concerns the administrative review of anti-dumping duties on Ball Bearings from France, produced and

exported by SKF France SA and Sarma (US case number A-427-801, 67 FR 55780 of 30 August 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty for SKF France SA and Sarma was 8.51% *ad valorem*.

Dumping margin without zeroing

DOC calculated a dumping margin of 8.51% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Ball Bearings from Italy

Specific Case No. 30

The administrative review

This case concerns the administrative review of anti-dumping duties on Ball Bearings from Italy, produced and exported by SKF Industrie SpA and FAG Italia SpA (US case number A-475-801, 67 FR 55780 of 30 August 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty was, *ad valorem*, 3.70% for SKF Industrie SpAand 1.42% for FAG Italia SpA.

Dumping margin without zeroing

DOC calculated a dumping margin for SKF Industrie SpA of 3.70% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [-..%] (negative) and no anti-dumping duty would have been collected.

As for FAG Italia SpA, DOC calculated a dumping margin of 1.42% while without the zeroing methodology the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

United States—Anti-Dumping Administrative Review on Imports of Ball Bearings from the United Kingdom

Specific Case No. 31

The administrative review

This case concerns the administrative review of anti-dumping duties on Ball Bearings from the United Kingdom, produced and exported by NSK Bearings Europe Ltd and the Barden Corporation UK (US case number A-412-801, 67 FR 55780 of 30 August 2002). The period of review is 1 May 2000 through 30 April 2001 and the rate of anti-dumping duty was, *ad valorem*, 16.87% for NSK Bearings Europe Ltd and 3.87% for the Barden Corporation UK.

Dumping margin without zeroing

DOC calculated for NSK Bearings Europe Ltd a dumping margin of 16.87% while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [- ...%] (negative) and no anti-dumping duty would have been collected.

As for the Barden Corporation UK, DOC calculated a dumping margin of 3.87%, while without the zeroing methodology (i.e. with the negative unit margins included), the dumping margin would have been [– ..%] (negative) and no anti-dumping duty would have been collected.

APPENDIX H

U.S. STATEMENTS AT THE WTO DISPUTE SETTLEMENT BODY MEETING

Geneva,
May 30, 2006

Item 1. UNITED STATES—LAWS, REGULATIONS AND METHODOLOGY FOR CALCULATING DUMPING MARGINS ("ZEROING")

A. IMPLEMENTATION OF THE RECOMMENDATIONS OF THE DSB

• Mr. Chairman, I am able to inform you that the United States intends to implement the DSB recommendations and rulings. The United States will need a reasonable period of time in which to do so.

• The United States stands ready to discuss this matter with the European Communities, in accordance with Article 21.3(b) of the DSU.

• However, the United States remains of the view that the Appellate Body report in this dispute is a deeply flawed document.

• We have considered the comments made by other Members at the May 9 DSB meeting regarding the Appellate Body report, and have continued our own study of the report. Unfortunately, the more we examine the report, the greater our concerns become.

• To further assist Members in their review of the report, we have provided some responses to comments we have heard and set forth some additional concerns in a written document, which currently is being distributed and which supplements the document we submitted at the meeting on May 9. We will request that this communication be circulated to all Members as a DS document.

- Rather than reading this document in its entirety, let me simply summarize the areas of concern that we discuss at greater length in the written document.

- First, there is the feet that in certain key areas the Appellate Body based its analysis not on the text of the Antidumping Agreement but rather on its own prior reports, particularly its report in US—Softwood Lumber V (DS264).

    - As just one example, the Appellate Body relied heavily on its interpretation of the term "product as a whole." However, "product as a whole" is a term that is not found anywhere in the Antidumping Agreement nor in Article VI of the GATT 1994.

    - Instead, it is a term that the Appellate Body used specifically in the context of the first sentence of Article 2.4.2 of the Antidumping Agreement and the average-to-average comparison method, the method that was at issue in the original Softwood Lumber V dispute.

    - Moreover, the Appellate Body misinterpreted its prior reports, thereby arriving at the erroneous conclusion that any kind of aggregated comparison requires an offset, regardless of context.

- The Appellate Body compounded its error by finding that the margin of dumping cannot be calculated on a transaction-specific basis.

    - The Appellate Body relied on Article 6.10 of the Antidumping Agreement to find that margins of dumping must invariably be established on an exporter- or producer-specific basis, which it assumed was inconsistent with calculating a margin of dumping on a transaction-specific basis.

    - However, Article 6.10 simply provides that a Member must calculate a margin for each individual exporter or producer—as opposed to one margin for all exporters or

producers. Article 6.10 says nothing about whether the margin must be based on more than one transaction, and it does not prohibit the calculation of a margin of dumping on a transaction-specific basis.

- There is also the matter of the Appellate Body's reliance on Article VI of the GATT 1994 and Article 2.1 of the Antidumping Agreement.

  - Mr. Chairman, as the United States previously explained, these provisions did not change as a result of the Uruguay Round negotiations.

  - The Appellate Body's conclusion essentially requires one to believe that the Uruguay Round negotiators dealt with zeroing by secretly agreeing to a new interpretation of the unchanged text of Article VI and Article 2.1. This is not plausible.

  - Moreover, the logic of the Appellate Body's conclusion is that all of the Members that continued to use zeroing after the entry into force of the WTO—including at least the EC, the United States, and Canada—did so in contradiction of this secret agreement and so acted in bad faith.

- And whether one accepts the Appellate Body's reading as permissible or not, the fact remains that other official, impartial experts reviewing these same provisions at the mandate of the DSB have concluded that there are other permissible interpretations of these same provisions. Under the standard or review articulated in the Antidumping Agreement, where a Member's measure rests on a permissible interpretation, the measure is required to be found in conformity with the agreement.

- Mr. Chairman. I could go on, but I won't.

- Instead, let me conclude by reiterating that the United States considers the issues presented by the Appellate Body

report to be important, and we welcome a discussion of them with Members.

[Second intervention:]

• Mr. Chairman, I would like to respond briefly to the EC's reference to Article 17.14 of the DSU, which states that adopted Appellate Body reports shall be unconditionally accepted by parties to a dispute.

• The United States notes that, from the inception of the WTO, Members have expressed their concerns with Appellate Body reports. For example, my EC colleagues will recall the EC's statements regarding the Bananas report (WT/DSB/M/37), the Mexico—Rice report (WT/DSB/M/202), and the Frozen Poultry report (WT/DSB/M/198).

• In so doing, Members have taken seriously their responsibility to the WTO dispute settlement system and have attempted to ensure that it is serving its function well. Expressing concerns with a report does not mean that a Member is "conditioning" its acceptance of the report.

• So, for example, in this dispute, the United States has not set any "conditions" on its acceptance of the report.

Item "OTHER BUSINESS"

A. STATEMENT BY MEXICO ON UNITED STATES—ANTI-DUMPING MEASURES ON OIL COUNTRY TUBULAR GOODS FROM MEXICO (WT/DS282)

• The United States thanks Mexico for its statement, which we will convey to capital.

• We have been in close contact with Mexico during the reasonable period of time regarding the redetermination in this matter, and we will continue to apprise Mexico with respect to this matter.

APPENDIX I

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') is requesting comments regarding the calculation of the weighted average dumping margin in an antidumping duty investigation. Currently, the Department usually makes comparisons between average export prices and average normal values and does not offset any dumping that is found with the results of comparisons for which the average export price exceeds the average normal value. A recent WTO dispute settlement report has found that the United States application of this methodology was inconsistent with our WTO obligations. In response to this report, the Department will abandon the use of average–to-average comparisons without such offsets. The Department seeks comment on the alternative approach(s) that may be appropriate in future investigations.

EFFECTIVE DATE: March 6, 2006.

DATES: To be assured of consideration, written comments must be received no later than 30 days after the date of publication in the Federal Register. Rebuttal comments must be received no later than 45 days after the publication date.

ADDRESS: Submit comments to David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce, Central Records Unit, Room 1870, Pennsylvania Avenue and 14th Street, NW., Washington, DC 20230; Attention: Weighted Average Dumping Margin.

FOR FURTHER INFORMATION CONTACT:

Michael Rill at 202) 482-3058, Mark Barnett at (202) 482-2866, or William Kovatch at (202) 482-5052.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 777A(d) (1) (A) of the Tariff Act of 1930, in an investigation, the Department may determine whether the subject merchandise is being sold at less than fair value either by comparing weighted average normal values to weighted average export prices[1] of comparable merchandise (the average-to-average comparison methodology), or by comparing normal values of individual transactions to the export prices[1] of individual transactions for comparable merchandise (the transaction-to-transaction comparison methodology). The Department's regulations state that the Department will normally use the average-to-average comparison methodology in an investigation. 19 C.F.R. 351.414(c)(1).

In applying the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade (''averaging groups''), and compares an average of the export price of transactions within one group to an average normal value for the same or similar model of the foreign like product at the same or most similar level of trade. When aggregating the results of the comparisons of averaging groups in order to determine the weighted average dumping margin, the Department has not allowed the results of averaging groups for which export price exceeds normal

---

[1] The Department may also use constructed export prices, if appropriate. Because the use of export prices or constructed export prices is not relevant to the substance of this notice, the Department refers only to export prices hereafter.

value to offset the results of averaging groups for which export price is less than normal value.[2]

The European Communities ("EC") challenged the denial of offsets, both "as such," and "as applied" in certain administrative determinations, as being inconsistent with the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement") before a dispute settlement panel. The panel circulated its report on October 31, 2005, finding, with respect to the specific antidumping duty investigations subject to the EC's challenge, that the Department's denial of offsets when using the average-to-average comparison methodology in an investigation is inconsistent with Article 2.4.2 of the Antidumping Agreement.[3] The United States has not appealed this aspect of the panel's report.

Proposal for Calculating the Weighted Average Dumping Margin in an Antidumping Investigation and Request for Comments

Pursuant to section 123(g)(1) of the Uruguay Round Agreements Act ("the URAA"), "[i]n any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements," certain requirements must be met before "that regulation or practice" may be "amended,

---

[2] Section 771(35)(A) of the Act defines the dumping margin as the amount by which normal value "exceeds" export or constructed export price. Section 771(35)(B) defines the weighted average dumping margin as the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export or constructed export price of that exporter or producer.

[3] Panel Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins* (*"US—Zeroing"*), WT/DS294/R, para. 7.32, circulated October 31, 2005 (*"Zeroing"*).

rescinded, or otherwise modified . . . ." Section 123(g)(1)(C) of the URAA requires that the Department provide opportunity for public comment by publishing "the proposed modifications and the explanation of the modification" in the Federal Register.

The WTO panel in US—*Zeroing* has found the denial of offsets in certain antidumping duty investigations, when using the average-to-average comparison methodology, to be inconsistent with Article 2.4.2 of the Antidumping Agreement.[4] Accordingly, the Department proposes that it will no longer make average–to-average comparisons without providing offsets for non–dumped comparisons.

The Department is soliciting comments pertaining to this proposal and appropriate methodologies to be applied in future antidumping duty investigations in light of the panel's report in *US—Zeroing*.

Timetable

After considering all comments received, the Department intends to publish in the Federal Register a final notice regarding the calculation of the weighted average dumping margin using the average-to-average comparison methodology in an investigation. See section 123(g)(1)(F) of the URAA (19 U.S.C. 3533(g)(1)(F)). Any changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology.

Comments—Format

Parties wishing to comment should submit a signed original and six copies of each set of comments, including reasons

---

[4] *US—Zeroing*, para. 7.32.

for any recommendations, along with a cover letter identifying the commenter's name and address. To help simplify the processing and distribution of comments and rebuttals, the Department requests that a submission in electronic form accompany the required paper copies. Comments filed in electronic form should be on CD—ROM in either WordPerfect format or a format that the WordPerfect program can convert into WordPerfect.

Comments received on CD—ROM will be made available to the public on the Web at the following address: http://ia.ita.doc.gov/. In addition, upon request, the Department will make comments filed in electronic form available to the public on CD—ROMs (at cost) with specific instructions for accessing compressed data (if necessary). Any questions concerning file formatting, document conversion, access on the Web, or other electronic filing issues should be addressed to Andrew Lee Beller, IA Webmaster, at (202) 482-0866 or via e-mail at *andrew.beller@mail.doc.gov*.

Dated: February 28, 2006.

David M. Spooner,
Assistant Secretary for Import Administration.

[FR Doc. 06-2134 Filed 3-3-06; 1:14 pm]

APPENDIX J

DEPARTMENT OF COMMERCE
International Trade Administration

Antidumping Proceedings: Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation; Final Modification

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final Modification; Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation.

SUMMARY: The Department of Commerce is modifying its methodology in antidumping investigations with respect to the calculation of the weighted-average dumping margin. This final modification is necessary to implement the recommendations of the World Trade Organization Dispute Settlement Body. Under this final modification, the Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The schedule for implementing this change is set forth in the "Timetable" section, below.

DATES: The effective date of this final modification is January 16, 2007.

FOR FURTHER INFORMATION CONTACT:

Mark Barnett (202) 482-2866, William Kovatch (202) 482-5052, or Michael Rill at (202) 482-3058.

SUPPLEMENTARY INFORMATION:

Background

This change in methodology concerns the calculation of the weighted-average dumping margin in investigations using the average-to-average comparison methodology.

Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Section 777A(d)(1)(A) of the Tariff Act of 1930, as amended (the Act), implements this provision of the Antidumping Agreement, providing that normally in an antidumping investigation, the Department may determine whether the subject merchandise is being sold at less than fair value through one of two options. The Department may compare a weighted-average of normal value to a weighted-average of the export or constructed export prices of comparable merchandise, known as the average-to-average comparison methodology. The Department also may compare normal values of individual transactions to the export prices or constructed export prices of individual transactions for comparable merchandise, known as the transaction-to-transaction comparison methodology.[1] The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA),

---

[1] Section 777A(d)(1)(B) of the Act also provides for an exceptional methodology to be used in antidumping investigations. The Department may compare a weighted-average normal value to the export prices or constructed export prices of individual transactions if there is a pattern of export prices or constructed export prices that differs significantly among purchasers, regions or periods of time, and the Department explains why such differences cannot be taken into account using one of the methods described in section 777A(d)(1)(A). This is known as the targeted dumping or average-to-transaction methodology.

H.R. Doc. No. 103-316, Vol. 1 at 842-43 (1994), reprinted in U.S.C.C.A.N. 3773 (SAA), and the Department's regulations state that the Department normally will use the average-to-average comparison methodology in an investigation. 19 CFR 351.414(c)(1).

When the Department applies the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade ("averaging groups"). 19 CFR 351.414(d)(2). The Department then compares an average of the export prices or constructed export price of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 CFR 351.414(d)(1).

Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the Department did not permit the results of averaging groups for which the weighted-average export price or constructed export price exceeds the normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value.

In October 2005, a World Trade Organization (WTO) dispute settlement panel issued a report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*") (*WT/DS294*) ("*US Zeroing (EC)*"). The panel found, among other things, that the Department's denial of offsets when using the average-to-average comparison methodology in certain antidumping investigations challenged by the European Communities ("EC") was inconsistent with Article 2.4.2 of the Antidumping Agreement.[2] The United States did not appeal this aspect of the panel's report.

---

[2] Panel Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*"), WT/DS294

On March 6, 2006, the Department published a notice in the Federal Register (71 FR 11189) proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. In that notice, the Department solicited comments and rebuttal comments on its proposal and appropriate methodologies to be applied in future antidumping investigations in light of the panel's report in *US-Zeroing (EC)*. On April 25, 2006, the Department extended the period of time for the submission of rebuttal comments (71 FR 23898). The Department received numerous comments and rebuttal comments submitted pursuant to these notices, as discussed below.

Final Modification Concerning the Calculation of the Weighted–Average Dumping Margin During an Antidumping Investigation

After considering all of the comments submitted, the Department is adopting this final modification concerning the calculation of the weighted-average dumping margin. The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.

Analysis of Public Comments

Numerous comments and rebuttal comments were submitted in response to the Proposed Modification. We have carefully considered each of the comments submitted. We have grouped and summarized the comments below according to common themes and responded accordingly.

Whether to Adopt the Department's Proposal

Some commentors welcomed the Department's proposal to permit offsets when making average-to-average comparisons, which would bring the Department's methodology into conformity with U.S. international obligations.

Other commentors argue that the denial of offsets creates more accurate results, because it combats the phenomenon of masked dumping. According to these commentors, masked dumping occurs when import transactions which are sold at less than normal value are masked by those sold at prices greater than normal value. The U.S. Court of Appeals for the Federal Circuit, these commentors note, has upheld the denial of offsets on these grounds. These commentors argue that if the Department is to grant offsets, it should do so on the narrowest grounds possible.

A few commentors argue that the Department cannot provide offsets without a statutory change. These commentors contend that the denial of offsets is required by the statute, because otherwise one of the permitted comparison methodologies would become redundant. According to these commentors, the statute permits the use of the average-to-average comparison methodology, the transaction-to-transaction comparison methodology, and, in some circumstances, the average-to-transaction comparison methodology. If offsets were for non-dumped sales are provided, the results of the average-to-average and the average-to-transaction comparison methodologies would be mathematically equivalent. To avoid this outcome, the Department must interpret the statute to require the denial of offsets.

Other commentors rebut this argument, contending that the use of the average-to-transaction comparison methodology will not necessarily be mathematically equivalent to the use of the average-to-average comparison methodology.

Department's Position: The Department is adopting as its final modification its proposal that it will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department is doing so in response to the panel's report in *US – Zeroing (EC)*, following the procedures set forth in section 123 of the URAA.

While some commentors argue that this modification requires a change in statute, the Department disagrees. Specifically, the courts have consistently held that the denial of offsets is not required by statute, but rather is a result of an interpretation of the statute. *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006); *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert. denied sub nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004). *See also Paul Muller Industrie GmbH v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

While we recognize that the Department may not interpret or apply the statute in a way so as to nullify a statutory provision, the Department is not making such an interpretation. This final modification is addressing only the calculation of the weighted-average dumping margin in an investigation using the average-to-average comparison methodology and not the average-to-transaction comparison methodology. The argument that the targeted dumping methodology would be nullified presumes that offsets would be provided under that methodology and that certain other methodological choices would be made. To date, the Department has not used the targeted dumping comparison methodology, nor made any determination as to the issue of offsets pursuant to that methodology. Consequently, to the extent appropriate, the Department will consider the nullification argument when it applies the targeted dumping methodology.

Whether the Average-to-Average Comparison Methodology Should Continue to be the Department's Preferred Methodology in Investigations

Some commentors argue that the average-to-average comparison methodology should continue to be the preferred methodology for use in an antidumping investigation. This would be consistent with the SAA and the Department's own

regulations. The use of the average-to-average comparison methodology simplifies the calculation of the weighted-average dumping margin, because it involves much simpler matching of export prices and normal values than would be involved if the transaction-to-transaction comparison methodology were used. According to these commentors, the average-to-average comparison methodology yields more predictable results because it is less sensitive to aberrational sales and price fluctuations due to market forces. The average-to-average comparison methodology is appropriate to use when there are a large number of sales, whereas 19 CFR 351.414(c)(1) states that the transaction-to-transaction comparison methodology is more appropriate for investigations involving few sales and the merchandise sold in both markets is identical, very similar, or custom-made.

Some of these commentors argued that even if the Department were to use the transaction-to-transaction comparison methodology, the application of that methodology should include the provisions of offsets. According to these commentors, the denial of offsets when using transaction-to-transaction comparison methodology results in an even more unbalanced calculation than the denial of offsets when using the average-to-average comparison methodology because the transaction-to-transaction comparisons would eliminate any impact of non-dumped sales.

Other commentors argue that the transaction-to-transaction comparison methodology with the denial of offsets should become the Department's standard methodology in antidumping investigations. These commentors note that the use of the transaction-to-transaction comparison methodology is permitted by statute. The Department has used this methodology recently in the Section 129 determination in *Certain Softwood Lumber Products from Canada*, and a WTO panel upheld its application. Any concerns over the complexity of applying the transaction-to-transaction comparison methodology are

alleviated by technological advances that ease the burden of matching a single normal value transaction to a single export transaction.

Some commentors argue that the Department itself has not proposed any change in methodology other than providing for offsets when engaging in average-to-average comparisons. According to these commentors, the Department cannot adopt a new comparison methodology without fulfilling the applicable notice and comment requirements of both section 123(g) of the URAA and the Administrative Procedures Act.

Department's Position: While the statute itself does not provide for a preference between the use of the average-to-average and transaction-to-transaction comparison methodologies in an antidumping investigation, the Department is mindful of the preference expressed in the SAA and in the Department's regulations for the use of average-to-average comparisons in investigations. See SAA at 842-43; 19 CFR 351.414(c)(1). Thus, we agree with those commentors that indicated that altering this preference would, at a minimum, require a change in regulation. Although the Department is not proposing a change of regulation at this time, the transaction-to-transaction methodology remains available to be used in appropriate situations.

Providing Offsets in All Types of Proceedings

Several commentors argue that the Department should provide offsets, not only when using the average-to-average comparison methodology in an antidumping investigation, but in all types of antidumping proceedings. These commentors contend that the denial of offsets violates overarching principles of fairness embodied in the WTO agreements. The distortion and inherent bias stemming from the denial of offsets apply equally to administrative reviews as they do to investigations. Moreover, this change would be simple to execute, as it would only require the deletion of a single line from the Department's standard computer programs.

Other commentors note that the finding of the WTO panel was narrow. The panel did not find that the denial of offsets in administrative reviews was inconsistent with the Antidumping Agreement, only that the Department's denial of offsets in certain investigations, when using the average-to-average comparison methodology, was inconsistent with the Antidumping Agreement. Moreover, if the Department were to provide offsets in other proceedings, it would need to provide a specific proposal and solicit further comments.

One commentor urges the Department to propose regulations to implement the targeted dumping provision of the Act. These regulations should specify that the Department will act whenever an interested party has demonstrated that targeted dumping is occurring, and should establish a threshold of when the price differences are significant enough to trigger the targeted dumping analysis.

Department's Position: In its March 6, 2006 Federal Register notice, the Department proposed only that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

Adopting a Change During the Negotiation of the Doha Round

Several commentors argue that the Department should not adopt a change with respect to offsets while the Doha Round of negotiations is still underway. According to these commentors, Congress gave explicit negotiation instructions to defend the denial of offsets. Thus, the Department should not adopt a change and provide for offsets while the issue is still being negotiated.

Department's Position: The Department is conducting this exercise pursuant to the procedures specifically established by section 123 of the URAA. This exercise is necessary to implement the panel report in *US - Zeroing (EC)* within the reasonable period of time negotiated by the United States. Notwithstanding this determination, the Department will continue to work closely with United States Trade Representative to pursue the negotiating objectives of the United States in the Doha Round.

Whether the Department Should Change Its Methodology as it Applies to Constructed Value and Non–Market Economies

One commentor argues that the WTO panel report did not address the denial of offsets when the Department compares constructed value to export price, or when the Department engages in a non-market economy analysis. Accordingly, the Department should continue to deny offsets in these two situations.

Department's Position: The Department has declined to adopt this suggestion. As stated above, when the Department engages in an average-to-average comparison, it divides the sales of the subject merchandise into "averaging groups." These averaging groups usually consist of identical or virtually identical merchandise sold at the same level of trade. 19 CFR 351.414(d)(2). The Department then calculates a weighted-average of the export prices or constructed export prices of the sales included in the averaging group, and compares that to the weighted-average of the normal values of such sales. 19 CFR 351.414(d)(1).

The use of constructed value and the factors of production methodology concerns the manner by which the Department calculates the average normal value in the average-to-average comparisons.

For example, the Department bases its calculation of normal value on constructed value "where home market sales of

the merchandise in question are either nonexistent, in inadequate numbers, or inappropriate to serve as a benchmark for a fair price, such as where sales are disregarded because they are sold at below-cost prices." SAA at 839. Constructed value is calculated on a control number-specific basis, and compared to the average export price of the corresponding averaging group.

Similarly, pursuant to section 773(c) of the Act, when an investigation involves a non-market economy country, the Department calculates normal value based on the factors of production methodology. Under this methodology, in an investigation the Department calculates a control number-specific normal value and compares it to the average export price for the corresponding averaging group.

Whether normal value is based on home market sales, third country sales, constructed value, or the factors of production methodology does not alter the manner in which the comparison is made between the weighted-average export price and the weighted-average normal value or the manner in which those results are aggregated in an investigation. Thus, if the Department is to provide offsets for non-dumped sales when utilizing the average-to-average comparison methodology in an antidumping investigation, there is no basis for treating investigations involving constructed value or the factors of production methodology that also utilize the average-to-average comparison methodology in a different manner.

Whether Implementation Should Apply to On–Going Investigations

Some commentors argue that if the Department provides offsets when using the average-to-average comparison methodology during an antidumping investigation, this change should apply to all pending proceedings. These commentors argue that when a U.S. court announces a new interpretation of a statute it would apply to all pending cases. Failing to do

so would create unequal justice, and, according to these commentors, would be a deliberate and purposeful violation of the WTO Antidumping Agreement.

Other commentors note that there is no precedent for a retroactive implementation of a WTO dispute settlement report. Rather, sections 123 and 129 of the URAA, which govern implementation, set forth a specific effective date.

Department's Position: In the March 6, 2006 Federal Register notice, the Department stated:

> Any changes in methodology will be applied in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology.

71 FR at 11189.

Section 123(g)(2) of the URAA provides that a final modification may not go into effect before the end of the 60-day period after the consultations described in section 123(g)(1)(E) begin, unless the President determines that an earlier effective date is in the national interest. While the statute establishes the manner of determining the effective date of any final modification adopted pursuant to section 123, the statute does not specify whether the final modification must apply only to new segments of proceedings initiated after the effective date, or may apply to any segments pending as of the effective date.

The SAA does not provide any more specific guidance regarding the application of any final modification adopted pursuant to section 123. The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date. SAA at 1026. However, the SAA makes no such statement with respect to section 123

modifications. The SAA merely states, "A final rule may not go into effect before the end of the 60-day consultation period unless the President determines that an earlier date is in the national interest." SAA at 1021.

In the prior four section 123 proceedings, the Department has applied the final modification or final rule to segments initiated after the effective date. *See, e.g., Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 70 FR 62061 (October 28, 2005) (applying amended regulations to sunset reviews initiated on or after the effective date); *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 FR 37125, 37138 (June 23, 2003) (applying new privatization methodology to investigations and reviews initiated on or after the effective date); *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186, 69197 (November 15, 2002) ("Arm's Length Test") (applying new methodology to investigations and reviews initiated on or after the effective date); *Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 FR 51236 (September 22, 1999). However, on occasion the Department has adopted and applied a change in policy involving a statutory interpretation to all segments pending as of the date of the change. *See, e.g., Basis for Normal Value When Foreign Market Sales Are Below Cost*, Policy Bulletin 98.1 (February 23, 1998); *Treatment of Inventory Carrying Cost in Constructed Value*, Policy Bulletin 94.1 (March 25, 1994).

In the section 123 proceeding concerning the Arm's Length Test, the Department found it significant that section 123 uses the term "go into effect." 67 FR at 69196. Thus, the Department noted that section 123 does not preclude applying the change so as to affect entries made prior to the announcement of the change. *Id.*

After careful consideration of the arguments presented by the commentors and of the information needed to implement this change, and weighing the administrative burdens, the Department has determined to apply the final modification adopted through this proceeding to all investigations pending before the Department as of the effective date.

First, in this particular instance, applying this final modification to all investigations pending before the Department will not create any undue administrative burden on the Department. The number of pending antidumping investigations is few (*i.e.* there are seven ongoing antidumping investigations).

Second, applying this change will not require the Department to gather any new information in those investigations.

Third, this announcement of the Department's intention to apply this modification to all pending investigations will not prejudice any of the parties to those proceedings. All of the currently pending investigations were initiated as a result of petitions filed after the date of publication of the Department's proposed modification. Thus, all of the interested parties in each of these investigations had notice of the Department's intention to modify the manner in which it calculates the weighted–average dumping margin when using the average–to-average comparison methodology in investigations. Moreover, even in the most advanced of the on–going investigations, there is sufficient time to permit the parties to comment on the application of this approach prior to the final determination in the investigation. In those investigations in which the Department will have reached a preliminary determination prior to the effective date of this notice, the Department will provide parties with notice and an opportunity to comment on the application of this methodology on the record of the investigation.

Timetable

The effective date of this notice is January 16, 2007, which is sixty days after the date on which the United States Trade Representative and the Department began consultations with the appropriate congressional committees, consistent with section 123(g)(1)(E) of the URAA. This methodology will be used in implementing the findings of the WTO panel in *US - Zeroing (EC)* pursuant to section 129 of the URAA concerning the specific antidumping investigations challenged by the EC in that dispute. The Department will apply this final modification in all current and future antidumping investigations as of the effective date.

Dated: December 20, 2006. David Spooner,

APPENDIX K

UNITED STATES – SECTION 129(c) (1) OF THE URUGUAY ROUND AGREEMENTS ACT

(WT/DS221)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 8, 2002

TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994	2
	A. Under Established WTO Jurisprudence, the Legislation of a Member Breaches That Member's WTO Obligations Only If the Legislation Mandates Action That Is Inconsistent With Those Obligations	2
	B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U. S. Principles of Statutory Interpretation	3
	C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules	4
III.	Canada Has Established No Basis for its Efforts to Create Distinctions Between Members with Retrospective Duty Assessment Systems and Members with Prospective Duty Assessment Systems	7
IV.	Canada's Answers to the Panel's Questions Confirm That Canada Is Seeking a Retroactive Remedy in Cases Involving Antidumping and Countervailing Duty Measures	11
V.	Conclusion	12
	Table of Exhibits	

I. Introduction

1. After a round of submissions, a meeting before the Panel, and the submission of responses to a comprehensive set of Panel questions, the issues in this dispute have become increasingly clear.

2. First, although it continues to state otherwise, Canada is in fact trying to use the dispute settlement system to establish a difference in the rights and obligations that apply to Members implementing adverse World Trade Organization recommendations and rulings in cases involving antidumping or countervailing duty measures, based entirely on whether a Member uses a prospective or a retrospective system to determine liability for antidumping and countervailing duties. It is doing so on the basis of an arbitrary and fictitious distinction regarding when a determination is allegedly "final" or "definitive" under either system. Canada's alleged distinction finds no support in the text of the AD Agreement,[1] the SCM Agreement,[2] GATT 1994,[3] or the DSU.[4] The AD and SCM Agreements recognize both systems for duty assessment, and there is nothing in the Agreements indicating that the Agreements are intended to promote or create advantages or disadvantages for one approach over the other. Neither Agreement addresses the issue of implementation of adverse DSB recommendations and rulings, and Canada has abandoned any claims under the DSU.

3. Second, although Canada purports to agree that WTO remedies are prospective only, and that the only disagreement

---

[1] *Agreement on Implementation of Article VI of the General Agreement on Tarifs and Trade 1994* (the "AD Agreement")

[2] *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement")

[3] *General Agreement on Tarifs and Trade* ("GATT 1994").

[4] *Understanding on Rules and Procedures for the Settlement of Disputes* (the "DSU").

in this dispute is what constitutes a "prospective" remedy, Canada is, in fact, seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures. There is no basis in the text of the WTO Agreement for such a requirement. Antidumping and countervailing duty measures are border measures; they affect trade at the border. If an antidumping or countervailing duty measure is successfully challenged in WTO dispute settlement, a Member can implement the adverse recommendations and rulings of the Dispute Settlement Body ("DSB") in a prospective manner by revising or withdrawing the border measure. By doing so, the Member will ensure that all entries that take place on or after the implementation date—the date the measure is modified or removed—will be unaffected by the WTO-inconsistent measure.

4. Third, and most important, as Canada has continued to refine and articulate its legal arguments, it has become increasingly clear that Canada has fundamentally misinterpreted what section 129(c)(1) actually requires. The United States explains below why Canada has failed to establish a *prima facie* case that section 129(c)(1) mandates a breach of any of the WTO provisions that form the basis for its claims.

5. The purpose of this submission is not to repeat all of the arguments made to date, although the United States continues to maintain all of the views that it has expressed in previous submissions. Rather, this submission will focus on a few key issues. The United States will begin by explaining how Canada has misinterpreted section 129(c)(1) and why its arguments fail to demonstrate that section 129(c)(1) mandates a breach of any of the WTO provisions that it has raised. The United States will then address the lack of any basis for Canada's assertion that the scope of a Member's implementation obligations in antidumping or countervailing duty disputes is determined by the date on which a Member makes a "definitive" or "final" determination of duty liability, and

not by date of entry. The United States will conclude by explaining why Canada's responses to the Panel's questions demonstrate conclusively that it is, in fact, seeking to establish an obligation for Members with retrospective assessment systems to provide retroactive relief, despite the absence of any support for such a requirement in the text of the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

II. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

6. Canada's decision to challenge section 129(c)(1) in the absence of any application of the provision to an actual fact pattern has made it difficult to understand the nature and extent of its claims and arguments. As Canada has continued to elaborate on its views, however, particularly in response to the Panel's written questions, it has become increasingly clear that Canada's entire case is based on a misinterpretation of what section 129(c)(1) actually requires. As the United States explains below, Canada's arguments fail to establish that section 129(c)(1) mandates action inconsistent with the AD Agreement, the SCM Agreement, or GATT 1994.

A. Under Established WTO Jurisprudence, the Legislation of a Member Breaches That Member's WTO Obligations Only If the Legislation Mandates Action that Is Inconsistent with Those Obligations

7. It is well established under GATT and WTO jurisprudence that legislation of a Member breaches that Member's WTO obligations only if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those obligations. If the legislation provides discretion to authorities to act in a WTO-consistent manner, the legislation, as such, does not violate a Member's WTO obligations.

8. The Appellate Body has explained that "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such—rather than a specific application of that legislation—was inconsistent with a Contracting Party's GATT 1947 obligations."[5] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO-consistent.

9. Most recently, the panel in the *Export Restraints* case applied the doctrine in concluding that certain provisions of the U.S. countervailing duty law did not mandate action inconsistent with provisions of the *Agreement on Subsidies and Countervailing Measures*.[6] The Panel in *Export Restraints* described the mandatory/discretionary distinction as a "classical test" with longstanding historical support.[7]

B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving anti-dumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date

---

[5] Appellate Body Report on *United States—Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88 *("U.S. 1916 Act AB Report")*.

[6] Panel Report on *United States—Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted 23 August 2001, paras. 8.4—8.131.

[7] *Id.* at para. 8.9.

of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

---

[8] *See, e.g.*, Panel Report on *United States—Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTOconsistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

---

[11] Canada's Responses to Questions, paras. 48, 49.

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

> (c) Effects of Determinations; Notice of Implementation.—
>
> (1) Effects of determinations.—Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> (A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and
>
> (B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what

actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding *(i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new

---

[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

> (1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments.* "Segment of a proceeding" or "segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.
>
> (2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and*

determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTOconsistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries

---

Strip from Korea, Agreement Under Article 21.3(b) of the DSU, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

See Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries in *the revocation determination itself*. Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM

---

[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would not violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the DSU, a Member's implementation obligations are prospective only.[17]

III. Canada Has Established No Basis for its Efforts to Create Distinctions Between Members with Retrospective Duty Assessment Systems and Members with Prospective Duty Assessment Systems

22. In its first written submission, the United States demonstrated that, when a Member is implementing adverse DSB recommendations and rulings, the obligation of that Member is to bring its measure into compliance on a prospective basis.[18] Canada does not dispute this.[19] What is in dispute in this case is what it means to implement adverse DSB recommendations and rulings on a prospective basis when the measure in question is an antidumping or countervailing duty measure.

23. The United States has explained that prospective implementation of adverse DSB recommendations and rulings involving an antidumping or countervailing duty measure means that the border measure in question must be brought into compliance with the DSB recommendations and rulings

---

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

[18] United States' first written submission, paras. 29-39.

[19] Canada's Oral Statement at the first Panel meeting, paras. 32-33.

and that all entries on or after the date of implementation must be treated consistently with the Member's WTO obligations.[20] In other words, prospective implementation is based on the date of entry.

24. Canada agrees that the date of entry is the relevant date for prospective implementation, provided that the Member in question has a prospective system of duty assessment.[21] In fact, Canada appears to agree that date of entry is an appropriate basis for considering prospective implementation for customs valuation issues as well.[22] Canada asserts, how-ever, that the same obligations undertaken by Members with prospective systems create different consequences for Mem-bers with retrospective systems[23] and that for Members with retrospective systems any determination made after the date of implementation must be consistent with the implementation, even if the determination involves pre-implementation entries.

25. Canada is the complainant in this dispute. As the complainant, Canada must make a *prima facie* case that the measure about which it complains constitutes a breach of WTO obligations. Making that *prima facie* case requires that Canada properly identify the measure about which it complains, and properly explain how that measure breaches the WTO obligations at issue. In this case, Canada has failed to identify how section 129(c)(1) breaches the United States' WTO obligations. As discussed above, Canada has failed to demonstrate that section 129(c)(1) mandates action inconsistent with Agreement obligations. As demonstrated herein, Canada also has failed to demonstrate either that retrospective

---

[20] *See, e.g.*, United States' first written submission, paras. 40-48; United States' Oral Statement at the first Panel meeting, paras. 3-8.

[21] Canada's Oral Statement at the first Panel meeting, para. 38.

[22] *See* Canada's Responses to Questions, paras. 38-39.

[23] *Id.*, paras. 39-40.

and prospective systems are sufficiently distinct as to create the starkly different consequences Canada alleges or that there is a textual basis in the WTO Agreement for these distinct consequences.

26. In response to Question 2 from the Panel, Canada set forth its position that date of entry should be the basis for implementation in prospective systems. Therein, Canada claimed that after implementation:

> the Member [with a prospective system] is not required to apply a WTOconsistent determination to the calculation of any refunds due. Under this scenario, a Member with a prospective duty assessment system has assessed and collected the duty before the expiration of the reasonable period of time. The subsequent revocation or amendment of the order pursuant to which that duty was collected after the expiry of the reasonable period of time has no effect on the assessment and collection of that duty.[24]

While Canada might wish to create the impression that antidumping or countervailing duties collected at the time of entry under its prospective system are somehow "final" or "determinative," and are, thereby, different from retrospective systems, such an impression would be inconsistent with reality. Canada's own Memoranda describing its antidumping and countervailing duty system indicate that assessment does not occur until 30 days after entry,[25] that the duty is subject to

---

[24] Canada's Responses to Questions, para. 5.

[25] Canadian Customs and Revenue Agency, Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act (May 15, 2000) para. 4 (Exhibit US-1); see also, Paper by Canada, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, footnote **** (Exhibit US14)(wherein Canada indicated that pursuant to its prospective system, assessment of antidumping duties may occur up to 30 days after entry and that this assessment is "subject to redetermination or appeal.").

redetermination based on a request from the importer within 90 days of entry,[26] and that Canada may redetermine the normal value, export price or the amount of subsidy associated with any imported product within two years of the original determination.[27]

27. Canada is seeking to draw a line between reviews conducted pursuant to Article 9.3.1 of the AD Agreement (in retrospective systems) and reviews conducted pursuant to Article 9.3.2 of the AD Agreement (in prospective systems). In essence, Canada is arguing that Members with retrospective duty assessment systems have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.1 reviews of pre-implementation entries, while Members with prospective systems do not have an obligation to apply adverse DSB recommendations and rulings when conducting Article 9.3.2 reviews of pre-implementation entries.

28. As the complainant in this dispute, Canada has the burden of demonstrating the legal basis for its claim. That legal basis must be rooted in the text of the WTO provisions that Canada has cited. Instead, Canada is attempting to establish a different and higher level of obligation for Members with retrospective duty assessment systems than for Members with prospective duty assessment systems, based on nothing

---

[26] Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Re-determination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000) para. 7 (Exhibit US-15).

[27] Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-6, Liability and Payment of Provisional Duty, Anti-Dumping Duty, and Countervailing Duty Under the Special Import Measures Act* (May 16, 2000) para. 22 (Exhibit US-2); Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-7, Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act* (May 15, 2000) para. 5 (Exhibit US-1).

more than an arbitrary, form over substance, description of when duties are purportedly "final" under the two systems.

29. The inconsistency in Canada's claims is further evidenced in Canada's position with respect to judicial review. In response to question 63 from the Panel, Canada stated:

> The date of the definitive duty assessment is the date the Department of Commerce, following judicial review, makes its final determination consistent with the decision of the reviewing court. [. . .] Assuming liquidation is enjoined pending the results of judicial review, the Department of Commerce determination does not take effect unless and until affirmed by the court. In the event the court disagrees with the Department of Commerce determination under review the court will remand the issue to the Department of Commerce to make its definitive determination not inconsistent with the court's decision.[28]

Canada's statement appears to imply that for Members with retrospective systems, an administrative determination subject to judicial review is not final until the completion of that judicial review. Canada suggested as much at the first Panel meeting, when its representative appeared to claim that an administrative determination made under a retrospective system would need to comply with adverse DSB recommendations and rulings if judicial review of that determination is not completed until after the implementation date. But Canada's determinations under its prospective system are also subject to judicial review. Canada has not explained how the same terms regarding judicial review in Article 13 of the AD Agreement and Article 23 of the SCM Agreement can be read to create such disparate results between Members with retrospective duty assessment systems and Members with prospective duty assessment systems.

---

[28] Canada's Responses to Questions, para. 83 (emphasis added).

30. Canada attempts to build its legal arguments around the concept of "finality;"[29] however, Canada employs inconsistent definitions of finality in order to create artificial distinctions between retrospective and prospective systems. The reality is that under either system, merchandise enters the customs territory of the Member and the importer transfers a sum of money to the Member because of the antidumping or countervailing measure in place. That sum might be called a definitive duty or it might be called a cash deposit. In either case, it may or may not be the final word on the amount to be paid because of the dumping or subsidization. In either case, a review may be requested and the importer may get money back. In either case, that review may be subjected to judicial review.

31. When Canada's labels are set aside, the similarities between the two duty assessment systems are striking and in both cases, the liability for antidumping or countervailing duties arises at the border, at the time of entry. Canada argues that a Member's WTO obligations are driven not by the text of the Agreements, but by the manner in which a Member establishes its domestic law, and that a Member can change its WTO obligations by arbitrarily designating an action as "final." Canada's claims seek to elevate the words used in domestic legislation over the substance of the obligations undertaken by Members, despite the fact that Canada has previously recognized that the AD Agreement, at least, does not provide detailed rules regarding how retrospective and

---

[29] *See* Canada's Responses to Questions, paras. 38-39 (seeking to introduce the concept of "finality" in response to the Panel's hypothetical facts in Question 17 and thereby basing whether a Member must treat an entry consistent with DSB recommendations and rulings on whether a domestic court, applying domestic legal principles, finds the initial action consistent with domestic law).

prospective duty assessment systems are to be applied.[30] Canada's claims are without foundation in the Agreements, would elevate form over substance, and create rights and obligations not provided for in the Agreements. By contrast, recognizing the date of entry as the controlling date for implementation avoids creating these differences that are not contemplated in the Agreements.

IV. Canada's Answers to the Panel's Questions Confirm That Canada Is Seeking a Retroactive Remedy in Cases Involving Antidumping and Countervailing Duty Measures

32. The United States has argued throughout this case that the DSU provides for prospective remedies in dispute settlement cases, and that there is no basis in the text of the DSU for requiring WTO Members to provide retroactive relief when their measures are found to be inconsistent with WTO rules.[31] Canada has claimed to support this concept.[32] Its answers to the Panel's questions, however, have conclusively demonstrated that Canada *is* in fact seeking to establish an obligation for Members with retrospective systems to provide retroactive remedies in cases involving antidumping and countervailing duty measures.

33. Canada clearly establishes this point in response to question 32 from the Panel. The question asked whether Canada was arguing that the United States was obliged to refund cash deposits collected on what Canada terms "prior unliquidated entries." Canada replied that the United States would in fact be required to return such cash deposits.[33] Thus,

---

[30] *Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997, at Topic 10, Part I (Prospective and Retrospective Duty Assessment) (Exhibit US-14).

[31] *See, e.g.*, United States' first written submission, para. 2.

[32] *See, e.g.*, Canada's Oral Statement at First Panel Meeting, paras. 32-33.

[33] *See* Canada's Responses to Questions, para. 67.

Canada believes that Members with retrospective systems are not only under an obligation to ensure that all future (post-implementation) actions conform to WTO rules; they are also under an obligation to undo *past* (pre-implementation) actions.

34. The United States appreciates Canada's candor, since it crystallizes for the Panel what this case is actually about. The United States fails, however, to see the legal basis for Canada's assertion. Canada has argued repeatedly during this dispute that its arguments do not amount to a claim for retroactive relief because it is only asking the United States to make its decisions *after* the implementation date in accordance with adverse DSB recommendations and rulings, even if those decisions relate to pre-implementation entries. And it has sought to distinguish the obligations applying to Members with prospective systems by claiming that those Members assess and collect duties at the time of entry, so that there are no decisions "after" the reasonable period of time that need to be made. In Canada's view, a Member would only violate WTO rules if were to make a WTO-inconsistent decision after the reasonable period of time.

35. When a Member with a retrospective system collects cash deposits, however, it does so pursuant to a determination made *prior to the date of entry* that the conditions for requiring such deposits were met. In this sense, the situation of the Member with a retrospective system is identical to the situation of the Member with a prospective system.

36. In addition, under the logic that Canada has applied to prospective systems, if a Member with a retrospective system took *no* action with respect to cash deposits after the implementation date, there would be no possibility of a WTO breach. Canada has failed even to attempt to explain how its asserted obligation not to take WTO-inconsistent action after the implementation date can somehow be transformed into an affirmative obligation to *take* a certain action—namely,

refunding cash deposits collected before the implementation date—when that "obligation" appears nowhere in the AD Agreement, the SCM Agreement, GATT 1994, or the DSU.

37. Finally, the United States notes one additional point on the subject of retroactive remedies. The United States has argued repeatedly that the scope of a Member's implementation obligations is governed by the situation in effect at the time of entry. As the United States noted at the first Panel meeting, however, if Canada is correct in arguing that the critical issue is the legal situation in effect when a Member determines final duty liability, then a Member that has received DSB authorization to suspend concessions may do so with respect to unliquidated, pre-authorization entries. Canada's attempt to distinguish the *Customs Bonding* case on the basis of when the "rate of duty is fixed" misses the point,[34] since its argument implies that a Member that "fixes" the rate of duty at some point after the date of entry could, in fact, suspend concessions on unliquidated, pre-authorization entries.

V. Conclusion

38. For the foregoing reasons, and for the reasons set out in previous submissions, the United States respectfully requests the Panel to find that Canada has failed to establish that section 129(c)(1) breaches any of the provisions that Canada cited in its request for a panel. Canada's arguments to the contrary are without a legal basis and the Panel should reject them.

---

[34] *See* Canada's Responses to Panel Questions, para. 80.

TABLE OF EXHIBITS

U.S. Exhibit	*Description*
11	*Restatement (Third) of the Foreign Relations Law of the United States*, §114 (1986)
12	*United States—Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000
13	*United States—Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001
14	*Paper by Canada*, G/ADP/AHG/W/30, 15 October 1997
15	Canadian Customs and Revenue Agency, *Memorandum on Regulation D14-1-3, Procedures for Making a Request for a Redetermination (An Appeal) of Goods Under the Special Import Measures Act* (December 15, 2000)

54

(2)

FILED
MAY 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1057

In The
Supreme Court of the United States

CORUS STAAL BV,

Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

Robert E. Lighthizer
John J. Mangan
Counsel of Record
Jeffrey D. Gerrish
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000
Counsel for Respondent
United States Steel Corporation

CERTIFICATE OF SERVICE

No. 06-1057

Corus Staal BV,

Petitioner,

v.

United States and United States Steel Corporation,

Respondents.

I, Jeffrey D. Gerrish, do hereby certify that, on this 2nd day of May, 2007, I caused three copies of the Brief of Respondent United States Steel Corporation in Opposition in the foregoing case to be served by hand delivery on the following parties:

Paul D. Clement, Esq.
SOLICITOR GENERAL OF THE UNITED STATES
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530-0001
(202) 514-2217

On behalf of United States

Richard O. Cunningham, Esq.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

On behalf of Corus Staal BV

JEFFREY D. GERRISH
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Federal Circuit erred in upholding the Department of Commerce's use of the so-called "zeroing" methodology in calculating the margin of dumping for Corus Staal BV rather than remanding to Commerce based on a purported intervening change in that methodology.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows: (1) the petitioner, Corus Staal BV, and (2) the respondents, the United States of America and United States Steel Corporation.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent United States Steel Corporation does not have a parent company. In addition, no publicly held company owns 10% or more of United States Steel Corporation's stock.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

I. Statutory Framework Relating to Determinations of Dumping 2

II. Statutory Framework Relating to the Treatment of the Uruguay Round Agreements and World Trade Organization Dispute Settlement Decisions 5

III. Administrative Proceedings Before Commerce 8

IV. Proceedings on Appeal 9

V. Commerce's Modification of the Zeroing Methodology in Certain Antidumping Investigations 10

REASONS FOR DENYING THE PETITION 13

I. The Federal Circuit's Decision Not to Remand the Instant Case to Commerce Does Not Conflict with the Decisions of this Court or the D.C. Circuit 14

II. The Federal Circuit's Decision Does Not Interfere with the United States' Ability to Comply with Its International Obligations 25

III. Corus' Contention that a Remand is of Great Importance Because of the Likelihood that the Issue Presented Here Will Arise in Other Cases Is Without Basis 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

NLRB v. Food Store Employees Union, 417 U.S. 1 (1974) 15, 16
PAM, S.p.A. v. U.S. Department of Commerce, 265 F. Supp. 2d 1362 (Ct. Int'l Trade 2003) 5
Panhandle Eastern Pipe Line Co. v. FERC, 890 F.2d 435 (D.C. Cir. 1989) 15, 16
Serampore Industries Pvt., Ltd. v. U.S. Department of Commerce, 675 F. Supp. 1354 (Ct. Int'l Trade 1987) 5
Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 976 (2004) 5
Williston Basin Interstate Pipeline Co. v. FERC, 165 F.3d 54 (D.C. Cir. 1999) 15, 16

STATUTES

19 C.F.R. § 351.212 (2006) 4
19 U.S.C. § 1673 (2000) 2, 3
19 U.S.C. § 1673d(c)(2) 3
19 U.S.C. § 1675(a)(1)(B) 3
19 U.S.C. § 1677a(a) 3
19 U.S.C. § 1677b(a)(1)(B)(i) 3
19 U.S.C. § 1677f-1(d)(1) 12
19 U.S.C. § 1677f-1(d)(2) 3
19 U.S.C. § 1677(35) 4
19 U.S.C. § 3512(d) 7
19 U.S.C. § 3533(g)(1) 6
19 U.S.C. § 3538 29
19 U.S.C. § 3538(b)(1) 6
19 U.S.C. § 3538(b)(2) 6
19 U.S.C. § 3538(b)(3) 6

19 U.S.C. § 3538(b)(4) 6
19 U.S.C. § 3538(c)(1) 6, 18
28 U.S.C § 1254(1) 2

OTHER AUTHORITIES

Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 Fed. Reg. 59565 (Dep't Commerce Nov. 29, 2001) (order) 8
Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 69 Fed. Reg. 33630 (Dep't Commerce June 16, 2004) (final results) 8
Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Dep't Commerce Mar. 6, 2006) (request for comments) 11
Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 77722 (Dep't Commerce Dec. 27, 2006) (final modification) 11, 12, 17
Initiation of Antidumping and Countervailing Duty Administrative Reviews, 67 Fed. Reg. 78772 (Dep't Commerce Dec. 26, 2002) (notice of initiation) 8
Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 67 Fed. Reg. 71936 (Dep't Commerce Dec. 3, 2002) (Section 129 Determ.) 19, 20

Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products from India, 68 Fed. Reg. 7967 (Dep't Commerce Feb. 19, 2003) (Section 129 Determ.) 19

Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities, 68 Fed. Reg. 64858 (Dep't Commerce Nov. 17, 2003) (Section 129 Determ.) 19, 20, 21, 27

Report of the WTO Appellate Body, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (Apr. 18, 2006) 11

Report of the WTO Panel, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R (Oct. 31, 2005) 11

Request for Consultations by the European Communities, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/1 (June 19, 2003) 10

Request for the Establishment of a Panel by the European Communities, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/7/Rev. 1 (Feb. 19, 2004) 10

Second Written Submission of the United States, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (Mar. 8, 2002)..... 22

Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, *reprinted in* 1994 U.S.C.C.A.N. 4040 ..... *passim*

United States - Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R (Nov. 29, 2004) 9

In The
Supreme Court of the United States

No. 06-1057

CORUS STAAL BV,

Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent United States Steel Corporation ("U.S. Steel") hereby submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner Corus Staal BV ("Corus").

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 2a) was entered without opinion on June 13, 2006 and is reported at 186 Fed. Appx. 997 (Fed. Cir. 2006). The order of the Federal Circuit denying the

petition for rehearing and rehearing en banc (Pet. App. 1a) is unreported.

The opinion of the U.S. Court of International Trade is reported at 387 F. Supp. 2d 1291 (Ct. Int'l Trade 2005) (Pet. App. 3a-27a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on June 13, 2006. Corus' petition for rehearing and rehearing en banc was denied on September 12, 2006. On November 30, 2006, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2007, and Corus' petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statutory Framework Relating to Determinations of Dumping

The U.S. trade laws provide remedies to domestic industries that have been harmed by unfairly traded imports. In particular, the Tariff Act of 1930, as amended (the "Act"), provides for the imposition of antidumping duties where a domestic industry has been materially injured or threatened with material injury by imports of products sold at less than fair value (i.e., products that have been "dumped") in the United States. 19 U.S.C. § 1673 (2000). Section 731 of the Act provides for the imposition of antidumping duties "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* The "normal value" is typically the price at which the subject merchandise is sold in the home

market of the foreign producer or exporter whereas the "export price" or "constructed export price" is the price at which the subject merchandise is sold in the United States. *See id.* §§ 1677a(a), 1677b(a)(1)(B)(i).

The U.S. Department of Commerce ("Commerce") investigates whether dumping is occurring and establishes the level of antidumping duties to apply to imports. The International Trade Commission (the "ITC") determines whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly traded imports. If both dumping and material injury are found in concurrent investigations conducted by Commerce and the ITC, an antidumping order is issued imposing antidumping duties on imports of the subject merchandise. *See id.* §§ 1673, 1673d(c)(2).

Thereafter, on an annual basis, Commerce may conduct administrative reviews of sales made by particular foreign producers or exporters of the merchandise subject to an antidumping order to determine a new antidumping duty rate for such producers or exporters. *See id.* § 1675(a)(1)(B). An administrative review covers a company's entries of subject merchandise during the relevant period of review. In an administrative review, Commerce uses its standard two-step procedure to calculate the company's weighted average dumping margin and antidumping duty rate.

In the first step, Commerce determines a "dumping margin" for each U.S. sale by comparing the price of such sale to the weighted average price of contemporaneous home market sales of the same or most similar product (i.e., the normal value). *See id.* § 1677f-1(d)(2). If the normal value is greater than the U.S. price, the comparison produces a positive number, establishing that dumping has occurred on

that sale. If the normal value is less than the U.S. price, the negative result indicates that the sale has been made at fair value and there is no dumping margin for that transaction.

In the second step of the margin calculation procedure, Commerce calculates the "weighted average dumping margin" for the foreign producer or exporter. *See id.* § 1677(35). In so doing, Commerce does not afford the foreign producer or exporter a "credit," or offset, for merchandise that was sold in the United States without dumping. It accomplishes this by aggregating the positive dumping margins determined in the first step (*i.e.*, the margins on sales where U.S. price is less than normal value and therefore dumping has occurred) and by setting to zero any so-called negative margins (*i.e.*, sales where U.S. price is greater than normal value). This is the methodology known as "zeroing." The sum of the positive dumping margins is then expressed as a percent of the total value of all U.S. transactions, including those for which no positive margin was obtained. This inclusion of the value of all such U.S. transactions has the effect of lowering the weighted average dumping margin because it increases the denominator. The weighted average dumping margin that is determined by Commerce in an administrative review serves as both the assessment rate for merchandise entered during the period of review and the cash deposit rate for new entries going forward. *See* 19 C.F.R. § 351.212 (2006).

Commerce's use of the zeroing methodology to calculate a company's weighted average dumping margin has been repeatedly upheld as reasonable by the U.S. Court of International Trade (the "CIT") and the U.S. Court of Appeals for the Federal Circuit. The CIT and the Federal Circuit have recognized that the use of zeroing produces more accurate results by combating the problem of masked

dumping. *See Timken Co. v. United States*, 354 F.3d 1334, 1343 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 976 (2004) ("*Timken*"); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp. 2d 1362, 1371 (Ct. Int'l Trade 2003); *Serampore Industries Pvt., Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). As the Federal Circuit determined in *Timken*, zeroing "legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Timken*, 354 F.3d at 1343.

II. Statutory Framework Relating to the Treatment of the Uruguay Round Agreements and World Trade Organization Dispute Settlement Decisions

In 1994, the United States became a signatory and party to the Uruguay Round Agreements and, as a result, a Member of the World Trade Organization (the "WTO"). The Uruguay Round Agreements, including the Anti-Dumping Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "WTO Dispute Settlement Understanding"), are not self-executing, and they have been implemented in U.S. law by the Uruguay Round Agreements Act (the "URAA").

In the URAA, Congress established detailed rules specifying how, if at all, the United States would respond to adverse decisions issued by WTO panels or the Appellate Body under the WTO Dispute Settlement Understanding. Section 123(g)(1) of the URAA expressly provides that where a WTO panel or the Appellate Body finds that a regulation or practice of an agency such as Commerce is inconsistent with one of the Uruguay Round Agreements, "that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report

unless and until" every one of six separate actions are taken. 19 U.S.C. § 3533(g)(1) (2000). These actions include consultations among Congress, the United States Trade Representative ("USTR"), and the agency in question, consultations with the relevant private sector advisory committees, submission of a report to the appropriate congressional committees, and provision of notice and an opportunity to comment on the proposed modification to the public. *Id.*

If a WTO panel or the Appellate Body finds that Commerce's determination in a particular case is inconsistent with one of the Uruguay Round Agreements, Section 129(b) of the URAA provides that USTR shall consult with Commerce and the appropriate congressional committees on the matter. *Id.* § 3538(b)(1). After such consultations, USTR may request Commerce to issue a determination to implement the WTO panel or Appellate Body report. *Id.* § 3538(b)(2). Before this determination may be implemented, USTR must consult again with Commerce and the appropriate congressional committees. *Id.* § 3538(b)(3). Thereafter, USTR "may" direct Commerce to implement its new determination "in whole or in part." *Id.* § 3538(b)(4).

Section 129(c)(1) of the URAA expressly provides that the implementation of an adverse WTO panel or Appellate Body report shall apply only with respect to "unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." *Id.* § 3538(c)(1). In this regard, U.S. law is fully in accordance with the general principle that WTO dispute settlement decisions apply prospectively only. As the Statement of Administrative Action (the "SAA")

approved by Congress in conjunction with the URAA[1] provides,

> [c]onsistent with the principle that [WTO] panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation.

SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313.

Because WTO dispute settlement reports have prospective effect only, the SAA recognizes that "relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available." *Id.* Moreover, the SAA provides that "[u]nder [Section] 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [the] Trade Representative's direction would remain subject to potential duty liability." *Id.*

---

[1] Congress has specifically directed that the URAA is to be interpreted and applied in accordance with the SAA. Indeed, by statute, Congress directed that the SAA must be regarded as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (2000).

III. Administrative Proceedings Before Commerce

Commerce issued an antidumping order on hot-rolled carbon steel flat products from the Netherlands on November 29, 2001. *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59565 (Dep't Commerce Nov. 29, 2001) (order). At the request of U.S. Steel, Commerce initiated the administrative review of the antidumping order on certain hot-rolled carbon steel flat products from the Netherlands that is the subject of this litigation on December 26, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78772 (Dep't Commerce Dec. 26, 2002) (notice of initiation). The only company subject to the administrative review was Corus, the sole producer of hot-rolled steel in the Netherlands. *See id.*

Prior to the issuance of Commerce's final results in the administrative review, Corus filed a case brief challenging Commerce's use of zeroing to calculate the company's weighted average dumping margin. In the issues and decision memorandum adopted as part of its final results, Commerce rejected Corus' argument on zeroing. Issues and Decision Memorandum in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 33630 (Dep't Commerce June 16, 2004) (final results) at Comment 4. Commerce found that its use of zeroing had been repeatedly upheld by the CIT and the Federal Circuit as a reasonable interpretation of the antidumping statute. *Id.* Moreover, Commerce found Corus' reliance on certain WTO decisions relating to the issue of zeroing to be baseless. *See id.*

IV. Proceedings on Appeal

The CIT upheld Commerce's margin calculation methodology in its entirety. Relying on precedent from the Federal Circuit, the CIT held that Commerce's use of zeroing was based on a reasonable interpretation of the statute. Pet. App. 13a-14a. The CIT also rejected Corus' reliance on the United States' implementation of the WTO Appellate Body's decision in *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("*Softwood Lumber*"). The CIT found that the Appellate Body's decision in *Softwood Lumber* only addressed zeroing "as applied" to the facts in that particular case and did not affect the zeroing methodology "as such." *Id.* at 16a.[2]

Further, the CIT concluded that even if the general methodology of zeroing had been challenged "as such" in *Softwood Lumber*, any implementation of the Appellate Body's decision in particular cases pursuant to Section 129 of the URAA would "only affect the unliquidated entries of subject merchandise that 'are entered, or withdrawn from warehouse, for consumption *on or after* . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." *Id.* (quoting 19 U.S.C. § 3538(c)(1)(A)) (emphasis in original). In other words, the CIT determined that any implementation of the

---

[2] In the WTO dispute settlement system, claims asserted against a policy or practice "as applied" involve challenges based on the application of the policy or practice to the "specific set of facts" in a particular case. They are distinguished from "as such" claims which challenge a WTO Member's policy or practice in general in all cases. *See United States - Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) at para. 6 and para. 6 n.22.

Softwood Lumber decision could only be applied prospectively under Section 129 of the URAA and, therefore, could not have any effect on the instant case. *Id.* at 16a-17a.

The U.S. Court of Appeals for the Federal Circuit affirmed in a *per curiam* decision issued on June 13, 2006. *Id.* at 2a. Corus thereafter submitted a petition for rehearing and rehearing en banc with respect to the issue of zeroing. The Federal Circuit rejected the petition and thereby once again upheld Commerce's use of zeroing on September 12, 2006. *Id.* at 1a.

V. Commerce's Modification of the Zeroing Methodology in Certain Antidumping Investigations

While the administrative review that is the subject of the instant case was pending before Commerce, the European Communities (the "EC") filed a WTO challenge against the use of zeroing in 15 antidumping investigations and 16 administrative reviews in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*US – Zeroing (EC)*"). *See* Request for Consultations by the European Communities, *US – Zeroing (EC)*, WT/DS294/1 (June 19, 2003); Request for the Establishment of a Panel by the European Communities, *US – Zeroing (EC)*, WT/DS294/7/Rev. 1 (Feb. 19, 2004), Pet. App. 75a-104a. The investigation of hot-rolled steel from the Netherlands was one of the 15 investigations challenged by the EC. In contrast, the administrative review at issue here was not among the reviews subject to the EC's challenge. *See id.*

In its decision, the WTO Panel found Commerce's use of zeroing in antidumping investigations involving comparisons of weighted average normal values to weighted average U.S. prices to be inconsistent with the WTO Anti-Dumping Agreement, both "as such" in investigations generally and "as applied" in the 15 individual investigations that were challenged by the EC. *See* Report of the WTO Panel, *US – Zeroing (EC)*, WT/DS294/R (Oct. 31, 2005) ("Panel Report in *US – Zeroing (EC)*"), at paras. 8.1(a) and 8.1(c). However, the Panel upheld Commerce's use of zeroing in administrative reviews, both "as such" and "as applied." *See id.* at paras. 8.1(d)-(g). On appeal, the WTO Appellate Body reversed the Panel in finding the use of zeroing in administrative reviews to be inconsistent with the Anti-Dumping Agreement, but only "as applied" in the 16 particular administrative reviews challenged by the EC. *See* Report of the WTO Appellate Body, *US – Zeroing (EC)*, WT/DS294/AB/R (Apr. 18, 2006) ("Appellate Body Report in *US – Zeroing (EC)*"), at paras. 132-135, 263(a)(i). Again, the review at issue here was *not* one of those 16 reviews.

On March 6, 2006, Commerce issued a notice pursuant to Section 123 of the URAA requesting comments from the public on its proposal to implement the WTO Panel's decision in *US – Zeroing (EC)* with respect to the use of zeroing in antidumping investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189 (Dep't Commerce Mar. 6, 2006) (request for comments), Pet. App. 109a-113a. Thereafter, Commerce announced on December 27, 2006 that it would no longer use zeroing to calculate weighted average dumping margins in antidumping investigations involving comparisons of weighted average normal values to weighted average U.S. prices. *See Antidumping*

Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 77722 (Dep't Commerce Dec. 27, 2006) (final modification) ("*Modification of Zeroing Methodology in Investigations*"), Pet. App. 114a-128a. In announcing this modification of its zeroing methodology pursuant to Section 123 of the URAA, Commerce clearly and unequivocally stated that the modification would apply only to the specified type of investigations (*i.e.*, investigations involving weighted average-to-weighted average comparisons). *Id.* at 77722, 77724, Pet. App. 114a, 117a.[3]

Thereafter, Commerce issued a preliminary determination under Section 129 of the URAA applying the modification of its zeroing methodology in the context of the individual antidumping investigations that were challenged by the EC in *US – Zeroing (EC)*, including the investigation on hot-rolled steel from the Netherlands. *See* Memorandum from Stephen Claeys to David Spooner Regarding Preliminary Results for the Section 129 Determinations: Certain Hot-Rolled Carbon Steel from the Netherlands, et al. (Feb. 26, 2007) at 3. Commerce issued its final determination in this Section 129 proceeding on April 9, 2007. *See* Memorandum from Stephen Claeys to David

---

[3] In antidumping investigations, Commerce may calculate a company's weighted average dumping margin using one of three comparison methods depending on the circumstances of the case: (i) comparisons of weighted average normal values to weighted average U.S. prices; (ii) comparisons of weighted average normal values to individual U.S. transaction prices, or (iii) comparisons of individual normal value transaction prices to individual U.S. transaction prices. *See* 19 U.S.C. § 1677f-1(d)(1) (2000). Commerce's modification of its zeroing methodology pertains only to the first of these comparison methods (*i.e.*, the weighted average-to-weighted average comparison method).

Spooner Regarding Final Results for the Section 129 Determinations: Certain Hot-Rolled Carbon Steel from the Netherlands, et al. (Apr. 9, 2007) ("*Final Section 129 Determination*") at 23.

REASONS FOR DENYING THE PETITION

The Federal Circuit properly declined to remand the instant case to Commerce. Contrary to Corus' contentions, Commerce has not somehow abandoned or changed its policy with respect to the use of zeroing in all cases. The recently announced modification of Commerce's zeroing methodology to implement the WTO Panel's decision in *US – Zeroing (EC)* only relates to the use of zeroing in certain antidumping investigations. The modification clearly would *not* apply to any other type of antidumping proceeding, including administrative reviews like the review at issue here. Additionally, pursuant to the clear provisions of U.S. law, the modification announced by Commerce can be applied in the context of individual cases pursuant to Section 129 of the URAA on a prospective basis only. As a result, it cannot and will not affect previous administrative reviews like the review at issue here.

Thus, the decision of the Federal Circuit not to remand the instant case does not conflict with this Court's decision in *NLRB v. Food Store Employees Union* ("*Food Store Employees Union*") or with the decisions of the U.S. Court of Appeals for the D.C. Circuit following it. The Federal Circuit's decision also will not interfere with the United States' ability to comply with its international obligations in implementing the WTO decisions in *US – Zeroing (EC)*. Finally, the issue raised by Corus here is limited and unique in nature and is unlikely to arise in other contexts. For each of these reasons, review by this Court is

unwarranted and Corus' petition for a writ of certiorari should be denied.

I. The Federal Circuit's Decision Not to Remand the Instant Case to Commerce Does Not Conflict with the Decisions of this Court or the D.C. Circuit

Corus contends that the Court should grant certiorari because the decision of the Federal Circuit not to remand the instant case to Commerce conflicts with the decisions of this Court and the U.S. Court of Appeals for the D.C. Circuit. As demonstrated below, there is no such conflict and, as a result, there is no basis for review by this Court.

According to Corus, the Federal Circuit's refusal to remand the instant case to Commerce "violates clear precedent of this Court" and conflicts with the decisions of the D.C. Circuit following that precedent. Pet. 11, 13-19. In particular, Corus argues that the Federal Circuit's decision conflicts with this Court's decision in *Food Store Employees Union* and with the D.C. Circuit's decisions in *Williston Basin Interstate Pipeline Co. v. FERC* ("*Williston Basin*") and *Panhandle Eastern Pipe Line Co. v. FERC* ("*Panhandle*"). *See id.* However, a review of the pertinent facts in each of the cases in question shows clearly and conclusively that there is *no* conflict between these cases and the Federal Circuit's decision in the instant case that could possibly warrant review. Indeed, a review of the pertinent facts in those cases shows that they simply are not applicable here.

In *Food Store Employees Union*, this Court addressed the NLRB's abandonment of the policy *that served as the very basis for its determination in that particular case.* Specifically, pursuant to its policy in effect at the time that it

issued the decision under review in *Food Store Employees Union*, the NLRB refused to award litigation expenses to the complaining union for the unfair labor practices that had been engaged in by the offending employer. *See Food Store Employees Union*, 417 U.S. 1, 6 (1974). However, while the appeal of the NLRB's decision was pending before the D.C. Circuit, the NLRB changed its policy in favor of awarding such expenses. *Id.* at 6-7. After the D.C. Circuit affirmatively ordered that these expenses be awarded in the case under review based on the NLRB's change in policy, this Court reversed. *See id.* at 10-11. In so doing, this Court found that "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *Id.* at 10 n.10.

The D.C. Circuit thereafter followed the principle announced by this Court in *Food Store Employees Union* in issuing its decisions in *Williston Basin* and *Panhandle*. In *Williston Basin*, the D.C. Circuit found that during the pendency of the appeal in that case, the Federal Energy Regulatory Commission ("FERC") had "shifted course" and revised the methodology that it had employed in reaching the decision under appeal. *Williston Basin*, 165 F.3d 54, 61-62 (D.C. Cir. 1999). Under those circumstances, the court held that the case should be remanded to FERC to determine whether its revised methodology should be applied in that case. *Id.* at 62-63.

Likewise, in *Panhandle*, the D.C. Circuit determined that during the pendency of the appeal, FERC revised one of the "legal norms" on which its decision rested in that case. *Panhandle*, 890 F.2d 435, 436, 438 (D.C. Cir. 1989).

Relying on this Court's decision in *Food Store Employees Union*, the D.C. Circuit held that it should remand the case for further proceedings to determine how the change in policy should be applied. *Id.* at 438.

Corus' reliance on the decisions in *Food Store Employees Union*, *Williston Basin*, and *Panhandle* is plainly misplaced. In each of these cases, the courts merely held that where an agency abandons or revises a policy *that served as the very basis for its determination in the case*, the proper course is to remand to the agency for it to decide whether it should modify that determination based on the intervening policy change. *See Food Store Employees Union*, 417 U.S. at 6-7, 10; *Williston Basin*, 165 F.3d at 62-63; *Panhandle*, 890 F.2d at 438-39. As the D.C. Circuit recognized in *Panhandle*, a court is not at liberty under these circumstances either to evaluate the agency's determination under its "*old* policy" or to assess on its own how the matter would be resolved under the agency's "*new* policy." *Panhandle*, 890 F.2d at 438-39. Rather, the court is "required to remand so that the [agency] may indicate how, if at all, its decision would be affected by its intervening policy change." *Id.* at 439.

There is no conflict between the decisions in these cases and the decision of the Federal Circuit in the instant case. Here, there is no "old" and "new" policy with respect to the use of zeroing in administrative reviews. The policy remains the same as it was when Commerce issued its final results in the administrative review at issue in this case. Specifically, Commerce continues to use zeroing in all administrative reviews. Commerce's modification of its zeroing methodology makes *no* change in this regard. Indeed, in announcing the modification of its zeroing methodology, Commerce made absolutely clear that the

modification would apply *only* to investigations involving average-to-average comparisons and would *not* apply to any other types of investigations or any other segments of antidumping proceedings.[4] *See Modification of Zeroing Methodology in Investigations*, 71 Fed. Reg. at 77724, Pet. App. 122a. Thus, it would *not* apply to administrative reviews like the review at issue here.

In other words, contrary to Corus' contentions, it is clear beyond any doubt that Commerce's announced modification of its zeroing methodology will have *no* effect on the administrative review determination that is at issue in this case. Accordingly, the decisions in *Food Store Employees Union*, *Williston Basin*, and *Panhandle* are simply inapplicable.

Nevertheless, Corus claims that the application of Commerce's modification of its zeroing methodology to the investigation in the instant case pursuant to Section 129 of the URAA will likely lead to the revocation of the antidumping order. *See* Pet. 16-18. In turn, Corus contends that this would remove the legal authority for conducting the administrative review at issue in this appeal and would require the retroactive termination of the review. *See id.* at 7-8, 16-18. According to Corus,

> [t]he issues that remain unresolved – issues relating to the effect of that retrospective application of the changed policy to the validity of the antidumping proceeding, including the validity of the appealed review

[4] The segments of an antidumping proceeding include, *inter alia*, the antidumping investigation and each administrative review of the antidumping order.

> – are quintessentially the type of issues that both this Court and the D.C. Circuit have held must be decided by the agency and that require a remand.

Id. at 19. Under these circumstances, Corus argues that it was incumbent upon the Federal Circuit to remand this case to Commerce and that the Federal Circuit erred in failing to do so. *Id.* at 16, 19. Corus' arguments in this regard are fundamentally flawed and fly in the face of the standards governing the implementation of WTO decisions under U.S. law. They should, therefore, be rejected.

In fact, in making its arguments, Corus assumes that any implementation of the WTO Panel's decision in *US – Zeroing (EC)* pursuant to Section 129 of the URAA will be applied retroactively so as to affect the review at issue here. However, this simply is *not* the case.

Under the express provisions of Section 129 of the URAA and the SAA, WTO dispute settlement decisions have prospective effect only. 19 U.S.C. § 3538(c)(1); SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. Thus, those decisions may *not* be applied retroactively to entries of merchandise into the United States that are made and administrative reviews that are conducted before they are implemented. As the SAA plainly states, Section 129 determinations to implement adverse WTO decisions "*have prospective effect only.* That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption *on or after the date on which the Trade Representative directs implementation.*" SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313 (emphasis added). This is just as true where an antidumping order is revoked as a result of a Section 129 determination as it is in

other contexts. In this regard, the SAA specifically provides that "[u]nder [Section] 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [the] Trade Representative's direction would remain subject to potential duty liability." *Id.*

This is precisely the way in which Commerce has applied Section 129 of the URAA in previous cases. Commerce has made quite clear in such cases that actions taken or changes made to comply with a WTO panel or Appellate Body decision apply only to subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs Commerce to implement its determination under Section 129. *See, e.g.*, *Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities*, 68 Fed. Reg. 64858, 64859 (Dep't Commerce Nov. 17, 2003) (Section 129 Determ.) ("*Privatization Section 129 Determination*"); *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products from India*, 68 Fed. Reg. 7967, 7976 (Dep't Commerce Feb. 19, 2003) (Section 129 Determ.); *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 Fed. Reg. 71936, 71937, 71939 (Dep't Commerce Dec. 3, 2002) (Section 129 Determ.) ("*Japan Hot-Rolled Section 129 Determination*").

Indeed, in the *Japan Hot-Rolled Section 129 Determination*, Commerce addressed an issue that was also on appeal before the Federal Circuit and, in so doing,

modified the antidumping duty rate for the respondent involved in that appeal. In response to concerns about the effect that the Section 129 determination could have on the Federal Circuit appeal, Commerce clearly and unequivocally stated that "this new determination, pursuant to section 129 of the URAA . . . , does not render moot the federal court appeal currently pending with respect to the antidumping duty order on hot-rolled steel." *Japan Hot-Rolled Section 129 Determination*, 67 Fed. Reg. at 71937. As Commerce explained, the Section 129 determination applied only to entries made after its effective date and did not affect prior entries subject to the appeal pending before the Federal Circuit. *Id.* Accordingly, Commerce recognized that its implementation of the WTO decision at issue in that case under Section 129 would not and could not affect prior entries.

Moreover, Commerce followed its practice of implementing WTO decisions with regard to future, rather than past, entries in the only case in which a final Section 129 determination resulted in the revocation of an order. *See Privatization Section 129 Determination*, 68 Fed. Reg. at 64859. In its *Privatization Section 129 Determination*, Commerce revoked two countervailing duty orders[5] in whole and revoked another order with respect to a particular company as the result of the application of its new privatization methodology. *See id.* However, the revocation of the orders in those cases was made effective only with

---

[5] Countervailing duty orders impose duties on foreign producers and exporters found to have benefited from improper subsidization by a foreign government. Countervailing duty proceedings have the same structure and present the same implementation issues as antidumping proceedings. Indeed, Corus itself has acknowledged that there is no material difference in the implementation issues presented by the two types of proceedings. *See* Pet. 24 n.16.

respect to future entries of the subject merchandise. *Id.* In other words, merchandise entered prior to the effective date of Commerce's Section 129 determination remained subject to countervailing duties. Assuming, *arguendo*, that the implementation of the WTO Panel's decision in *US – Zeroing (EC)* results in the revocation of the antidumping order on hot-rolled steel from the Netherlands, the revocation should likewise be made effective *only* with respect to future entries of the subject merchandise.

Despite the foregoing, Corus contends that it is somehow unclear as to how past entries of the subject merchandise are to be treated where Commerce implements a WTO decision through Section 129 of the URAA. *See* Pet. 9-10. This contention is simply devoid of merit. In fact, this contention ignores the plain language of Section 129, the SAA, and the Department's practice on this issue. These authorities conclusively establish that the implementation of WTO decisions through Section 129 is *only to apply prospectively to future entries of the subject merchandise* and, therefore, necessarily does *not* apply to past entries.

Corus is also wrong in relying on the CIT's decision in *Jilin Henghe Pharm. Co. v. United States* for the proposition that once Commerce's dumping determination is invalidated, it cannot serve as a legal basis for the imposition of antidumping duties. Pet. 18. Indeed, Corus' reliance on that U.S. court decision flatly disregards the clear distinction made in the SAA between implementation of WTO reports under Section 129 of the URAA and the relief available before the U.S. courts. As the SAA clearly states, "relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available." SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at

4313. In other words, there is no basis for comparison between a Section 129 determination and the relief available before the U.S. courts.

Lacking support anywhere in U.S. law for its arguments, Corus relies most heavily on a statement made by the United States in the course of the WTO dispute settlement proceeding commenced by Canada to challenge Section 129 of the URAA. *See* Pet. 10-11, 18. Specifically, Corus relies on the following statement made by the U.S. government in the course of that proceeding:

> The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. *In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.*

Second Written Submission of the United States, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (Mar. 8, 2002) at para. 19, Pet. App. 139a-140a (emphasis added).

This statement provides no support for Corus' contentions. Even assuming the accuracy of the statement, it simply explains that in an administrative review conducted *subsequent to* the implementation of an adverse WTO decision pursuant to Section 129 of the URAA, Commerce would have to decide how to treat entries subject to the review that were made prior to the date of revocation. This does not change the fact that Commerce's implementation of a WTO decision may *not* affect prior entries subject to *previously conducted administrative reviews* in a particular case.

Indeed, this is precisely the position taken by Commerce in its *Final Section 129 Determination* to implement the WTO Panel decision in *US – Zeroing (EC)* and by the U.S. government in each of Corus' appeals to the U.S. courts from the administrative reviews of the antidumping order in this case, including the review at issue here. Specifically, in the *Final Section 129 Determination*, Commerce specifically stated that it "disagrees that any revocations that result from these section 129 proceedings apply to entries made prior to the implementation date," including entries subject to prior administrative reviews like the review at issue here. *Final Section 129 Determination* at 16. Commerce also concluded that "pursuant to the statute and the SAA, any revocations resulting from these section 129 proceedings will not apply to entries made before the date of USTR's direction." *Id.* at 17.

Moreover, in Corus' appeals of the administrative reviews conducted by Commerce in this case, the U.S. government has stated to the CIT and the Federal Circuit that the implementation of the WTO decisions in *US – Zeroing (EC)* and even the revocation of the order as part of that implementation could not possibly affect the entries subject

to those reviews. As the U.S. government stated in its brief submitted to the Federal Circuit in the instant case,

> even if USTR ultimately were to instruct Commerce to implement a new determination that resulted in the revocation of the antidumping order on hot-rolled steel from the Netherlands as a result of the conclusion of the dispute in *US – Zeroing*, . . . *that implementation would have no effect upon the entries in this appeal, but could only be applied prospectively.*

Brief of Defendant-Appellee United States in *Corus Staal BV v. United States*, Federal Circuit Court No. 05-1600 (Feb. 9, 2006) ("U.S. Brief in *Corus Staal*") at 21 (citing 19 U.S.C. § 3538(c)(1)) (emphasis added).

Thus, the U.S. government could not have been any clearer or emphatic in its statements regarding this issue and how it affects the instant case. As the U.S. government has plainly stated, any implementation of the WTO decisions in *US – Zeroing (EC)* could only be applied prospectively and would not have any effect on previous entries of the subject merchandise and previously conducted administrative reviews like the review in question here.

The bottom line is that the administrative review at issue in the instant case could not possibly be affected by the WTO Panel's decision in *US – Zeroing (EC)* because any implementation of that decision must be done on a prospective basis only. As a result, the Federal Circuit's decision not to grant a remand to Commerce in the instant case is consistent with the decisions of this Court and the

D.C. Circuit. There is no basis for further review, and Corus' petition for a writ of certiorari should be rejected.

II. The Federal Circuit's Decision Does Not Interfere with the United States' Ability to Comply with Its International Obligations

Corus next argues that because the United States has obligated itself to implement the WTO's decisions in *US – Zeroing (EC)*, it is "particularly important" for the instant case to be remanded to Commerce. *See* Pet. 19. In this regard, Corus offers three reasons why it believes a remand is important here:

> First, such a remand is consistent with the congressionally-mandated implementation regime for adverse WTO reports. This statutory regime places the responsibility for implementation squarely in the Executive Branch. . . . Second, such a remand comports with the constitutional separation of powers which recognizes the sole competency of the Executive Branch in conducting the foreign affairs of the United States. . . . Finally, such a remand also comports with general principles of administrative law which recognize the importance of allowing agencies primary jurisdiction to determine how to conduct agency proceedings.

Id. at 19-20 (citations omitted). Corus is wrong on each of these counts.

First, a remand is not necessary to comply with the "congressionally-mandated implementation regime for

adverse WTO reports." *See id.* at 19. To the contrary, Commerce and USTR have already acted to implement the WTO Panel's "as such" decision in *US – Zeroing (EC)* through a modification of the zeroing methodology pursuant to Section 123 of the URAA. In addition, Commerce has applied the modification of its zeroing methodology in the individual investigations challenged "as applied" by the EC pursuant to Section 129 of the URAA. Thus, the statutory regime for implementing WTO decisions has been followed here, and there is no need for a remand.

Moreover, Corus' arguments regarding the "sole competency of the Executive Branch in conducting the foreign affairs of the United States" and the need to allow agencies "primary jurisdiction to determine how to conduct agency proceedings" are simply irrelevant. *See id.* at 20. Here, there has been *no* interference with the Executive Branch's ability to exercise its foreign affairs powers or with Commerce's ability to conduct its proceedings. Rather, Commerce and USTR have exercised full control over the implementation of the WTO decisions in *US – Zeroing (EC)* and have not been constrained by the Federal Circuit or any other entity in their ability to implement those decisions. Indeed, the Executive Branch has not complained, in any way, about limits on its power or ability to conduct its proceedings and has not sought a remand so as to implement *US – Zeroing (EC)* in the instant case. To the contrary, the Executive Branch has made clear that a remand is neither necessary nor appropriate in the instant case because the implementation of *US – Zeroing (EC)* will be done on a prospective basis only and could not possibly affect the administrative review at issue here. *See Final Section 129 Determination* at 16-17; U.S. Brief in *Corus Staal* at 21. For this reason as well, there is no basis for a remand.

There likewise is no basis for Corus' assertion that "[t]he issues inherent to revoking an antidumping order in response to an adverse WTO report, particularly whether such a revocation will reach previously entered but unliquidated entries, have never been resolved by the Executive Branch." Pet. 22. This assertion ignores the fact that Commerce addressed and resolved such issues in its *Privatization Section 129 Determination*. Specifically, although Commerce revoked three countervailing duty orders, in whole or in part, in that proceeding, the revocation of the orders was made effective only with respect to future entries of the subject merchandise.[6] *Privatization Section 129 Determination*, 68 Fed. Reg. at 64859. Thus, merchandise that entered prior to the effective date of Commerce's determination remained subject to countervailing duties.

Corus' argument on this point also disregards the SAA's instruction that if an antidumping or countervailing duty order is revoked as a result of a Section 129 determination implementing an adverse WTO report, entries made prior to the effective date of the Section 129 determination remain subject to duties. SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. Corus' entries in the administrative review at issue here fall squarely within this rule. They should, therefore, be subject to duties even if the antidumping order is revoked.

---

[6] As noted above, although Commerce's *Privatization Section 129 Determination* involved the revocation of *countervailing duty*, rather than *antidumping*, orders, the same implementation issues arise with respect to both types of proceedings. Accordingly, there is no basis for distinction between the two here.

Lastly, Corus claims that "if the United States is unable to reach previously entered but unliquidated entries in implementing *U.S.-Zeroing*, the United States may be in violation of its international obligations under the WTO Agreements." Pet. 22. This contention simply does not comport with the facts. Indeed, under both U.S. law and the WTO Agreements, WTO dispute settlement decisions like the ones in *US – Zeroing (EC)* only apply prospectively. SAA .at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. Accordingly, the United States clearly will not be in violation of its international obligations simply because its implementation of *US – Zeroing (EC)* does not reach prior entries of the subject merchandise. To the contrary, the United States will be in complete accordance with its obligations based on the prospective nature of its implementation.

In sum, Corus' arguments regarding the need for a remand in the instant case to enable the United States to comply with its international obligations should be rejected. Such arguments are devoid of merit and certainly do not offer any basis to justify this Court's review.

III. Corus' Contention that a Remand is of Great Importance Because of the Likelihood that the Issue Presented Here Will Arise in Other Cases Is Without Basis

Corus contends that it is particularly important for this Court to grant its petition for a writ of certiorari here because the issue it raises regarding the need for a remand is likely to arise again in other cases both within and beyond the international trade context. *See* Pet. 23-27. However, Corus' discussion regarding the importance of this issue is simply baseless.

In an attempt to demonstrate the importance of the issue that it presents, Corus argues that the issue is likely to arise again not only in appeals involving determinations issued by Commerce and the ITC in antidumping and countervailing duty cases, but also in "numerous other appeals involving agency action and agency policies . . . ." Pet. 25. In this regard, Corus asserts that the issue could arise in appeals of other matters heard by the Federal Circuit, including determinations of the U.S. Patent and Trademark Office, the Merit Systems Protection Board, and agency boards of contract appeals. *Id.* at 26. Corus is flatly wrong.

In fact, the issue raised by Corus here arises out of and is inherently linked to the specialized process for the implementation of WTO decisions established by Section 129 of the URAA. *See id.* at 9-11, 17-19, 24. However, the statutory process established by Section 129 is limited, on its face, *solely* to the implementation *by Commerce and the ITC* of WTO decisions involving *antidumping and countervailing duty matters*. 19 U.S.C. § 3538. In other words, the statutory process cannot possibly have *any* application outside of such matters, and, as a result, the issue raised by Corus is likewise limited to such matters..

Not only is it impossible for the issue that Corus presents to arise outside of the international trade context, it is even unlikely to arise in other antidumping and countervailing duty cases. Indeed, the issue that Corus presents is based on a unique confluence of factors. Specifically, it would arise only where (i) an appeal of the original antidumping investigation in a case is brought at the WTO; (ii) an administrative review conducted by Commerce in that same case is appealed to the U.S. courts; (iii) while the appeal of the administrative review is pending, the WTO

issues an adverse decision with respect to the original investigation in the case; and (iv) while the appeal of the administrative review is still pending, Commerce implements the WTO's adverse decision and that implementation results in the revocation of the antidumping order. Under these circumstances, Corus contends that Commerce would have to determine how the revocation of the order affects the legal status of the administrative review at issue and the entries subject to that review. *See* Pet. 9-11, 17-19, 24. However, this precise confluence of circumstances is highly unusual. It has not arisen in any prior case and is not likely to arise in more than a few, isolated instances in the future. Thus, contrary to Corus' contentions, the issue presented in the instant case plainly is not an issue that merits this Court's review.

CONCLUSION

For all of the reasons set forth above, Corus' petition for a writ of certiorari should be denied.

Respectfully submitted,

Robert E. Lighthizer
John J. Mangan
Counsel of Record
Jeffrey D. Gerrish
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000
Counsel for Respondent
United States Steel Corporation

May 2, 2007

APPENDIX

19 C.F.R. § 351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments

(a) *Introduction.* Unlike the systems of some other countries, the United States uses a "retrospective" assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review had been completed, the cash deposit rate applicable at the time merchandise was entered. This section contains rules regarding the assessment of duties, the provisional measures deposit cap, and interest on over- or undercollections of estimated duties.

(b) *Assessment of antidumping and countervailing duties as the result of a review—(1) Antidumping duties.* If the Secretary has conducted a review of an antidumping order under § 351.213 (administrative review), § 351.214 (new shipper review), or § 351.215 (expedited antidumping review), the Secrete normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary

normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

(2) *Countervailing duties.* If the Secretary has conducted a review of a countervailing duty order under § 351.213 (administrative review), or § 351.214 (new shipper review), the Secretary normally will instruct the Customs Service to assess countervailing duties by applying the rates included in the final results of the review to the entered value of the merchandise.

(c) *Automatic Assessment of antidumping and countervailing duties if no review is requested.* (1) If the Secretary does not receive a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing

duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) to continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess the antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section.

(3) The automatic assessment provisions of paragraphs (c)(1) and (c)(2) of this section will not apply to subject merchandise that is the subject of a new shipper review (see § 351.214) or an expedited antidumping review (see § 351.215).

(d) *Provisional measures deposit cap.* This paragraph applies to subject merchandise entered, or withdrawn from warehouse, for consumption before the dare of publication of the Commissions notice of an affirmative final injury determination or, in a countervailing duty proceeding that involves merchandise from a country that is not entitled to an injury test, the date of the Secretary's notice of an affirmative final countervailing duty determination.

If the amount of duties that would be assessed by applying the rates included in the Secretary's affirmative preliminary or affirmative final antidumping or countervailing duty determination ("provisional duties") is different from the amount of duties that would be assessed by applying the assessment rate under paragraphs (b)(1) and (b)(2) of the section ("final duties"), the Secretary will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping or countervailing duties at the assessment rate if the provisional duties exceed the final duties.

(e) *Interest on certain overpayments and underpayments.* Under section 778 of the Act, the Secretary will instruct the Customs service to calculate the interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry.

(f) *Special rule for regional industry cases*—(1) *In general.* If the Commission, in its final injury determination, found a regional industry under section 771(4)(C) of the Act, the Secretary may direct that duties not be assessed on subject merchandise of a particular exporter or producer if the Secretary determines that:

(i) The exporter or producer did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation;

(ii) The exporter or producer has certified that it will not export subject merchandise for sale in the region concerned in the future so long as the antidumping or countervailing duty order is in effect; and

(iii) No subject merchandise of the exporter or producer was entered into the United States outside of the region and then sold into the region during or after the Department's period of investigation.

(2) *Procedures for obtaining an exception from the assessment of duties*—(i) *Request for exception.* An exporter or producer seeking an exception from the assessment of duties under paragraph (f)(1) of this section must request, subject to the provisions of § 351.213 or § 351.214, and administrative review or new shipper review to determine whether subject merchandise of the exporter or producer in question should be excepted from the assessment of duties under paragraph (f)(1) of this section. The exporter or producer making the request may request that the review be limited to a determination as to whether the requirements of

paragraph (f)(1) of this section are satisfied. The request for a review must be accompanied by:

(A) A certification by the exporter or producer that it did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation, and that it will not do so in the future so long as the antidumping or countervailing duty order is in effect; and

(B) A certification from each of the exporter's or producer's U.S. imports of the subject merchandise that no subject merchandise of that exporter or producer was entered into the United States outside such region an then sold into the region during or after the Department's period of investigation.

(ii) *Limited review.* If the Secretary initiates an administrative review or a new shipper review based on a request for review that includes a request for an exception from the assessment of duties under paragraph (f)(2)(i) of this section, the Secretary, if requested, may limit the review to a determination as to whether an exception from the assessment of duties should be granted under paragraph (f)(1) of this section.

(3) *Exception granted.* If, in the final results of the administrative review or the new shipper

review, the Secretary determines that the requirements of paragraph (f)(1) of this section are satisfied, the Secretary will instruct the Customs Service to liquidate, without regard to antidumping or countervailing duties (whichever is appropriate), entries of subject merchandise of the exporter or producer concerned.

(4) *Exception not granted.* If, in the final results of the administrative review or the new shipper review, the Secretary determines that the requirements of paragraph (f)(1) are not satisfied, the Secretary:

(i) Will issue assessment instructions to the Customs Service in accordance with paragraph (b) of this section; or

(ii) If the review was limited to a determination as to whether an exception from the assessment of duties should be granted, the Secretary will instruct the Customs Service to assess duties in accordance with paragraph (f)(1) or (f)(2) of this section, whichever is appropriate (automatic assessment if no review is requested).

* * * *

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty

imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

* * * *

19 U.S.C. § 1673d. Final determinations

* * * *

(c) Effect of final determinations

* * * *

(2) Issuance of order; effect of negative determination

If the determinations of the administering authority and the Commission under subsections (a)(1) and (b)(1) of this section are affirmative, then the administering authority shall issue an antidumping duty order under section 1673e(a) of this title. If either of such determinations is negative, the investigation shall be terminated upon the publication of notice of that negative determination and the administering authority shall—

(A) terminate the suspension of liquidation under section 1673b(d)(2) of this title, and

(B) release any bond or other security, and refund any cash deposit, required under section 1673b(d)(1)(B) of this title.

* * * *

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

* * * *

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

* * * *

19 U.S.C. § 1677a. Export price and constructed export price

(a) Export price

The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

* * * *

19 § 1677b. Normal value

(a) Determination

In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

(1) Determination of normal value

* * * *

(B) Price

The price referred to in subparagraph (A) is-

(i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the

ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or

* * * *

19 § 1677f-1. Sampling and averaging; determination of weighted average dumping margin and countervailable subsidy rate

* * * *

(d) Determination of less than fair value

(1) Investigations

(A) In general

In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value—

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

> **(i)** there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> **(ii)** the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

(2) Reviews

In a review under section 1675 of this title, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the

calendar month that corresponds most closely to the calendar month of the individual export sale.

* * * *

19 U.S.C. § 1677 Definitions; special rules

* * * *

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

(C) Magnitude of the margin of dumping

The magnitude of the margin of dumping used by the Commission shall be-

(i) in making a preliminary determination under section 1673b(a) of this title in an investigation (including any investigation in which the Commission cumulatively assesses the volume and effect of imports under paragraph (7)(G)(i)), the dumping margin or margins published by the administering authority in its notice of initiation of the investigation;

(ii) in making a final determination under section 1673d(b) of this title, the dumping margin or margins most recently published by the administering authority prior to the closing of the Commission's administrative record;

(iii) in a review under section 1675(b)(2) of this title, the most recent dumping

margin or margins determined by the administering authority under section 1675a(c)(3) of this title, if any, or under section 1673b(b) or 1673d(a) of this title; and

(iv) in a review under section 1675(c) of this title, the, dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.

* * * *

19 U.S.C. § 3512. Relationship of agreements to United States law and State law

* * * *

(d) Statement of administrative action

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

* * * *

19 U.S.C. § 3533 Dispute settlement panels and procedures

* * * *

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

* * * *

19 U.S.C. § 3538 Administrative action following WTO Panel Reports

(a) Action by United States International Trade Commission

(1) Advisory Report

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a Report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory Report on whether title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

(2) Time Limits for Report

The commission shall transmit its report under paragraph (1) to the Trade Representative—

(A) in the case of an interim report described in paragraph (1), within 30 calendar days after the Trade Representative requests the report; and

(B) in the case of a report of the Appellate Body, within 21 calendar days after the Trade Representative requests the report.

(3) Consultations on request for Commission determination

If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade Representative shall consult with the congressional committees concerning the matter.

(4) Commission determination

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C.A. § 1202 et seq.] or title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.], if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the

particular proceeding that would render the Commission's actions described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

(5) Consultations on implementation of Commission determination

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) Revocation of order

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C.A. § 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C.A. § 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

(2) Notice of implementation

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.].

(B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.].

(d) Opportunity for comment by interested parties

Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.

* * * *

THE URUGUAY ROUND AGREEMENTS ACT STATEMENT OF ADMINISTRATIVE ACTION

* * * *

[Page 1026]

(3) Effect of Determinations

Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.

To ensure that private parties are aware of the effective date of an implemented determination, subsection (c)(2) requires Commerce or the Trade Representative to publish notice in the *Federal Register* of the implementation of determinations under section 129.

* * * *

(3)

Supreme Court, U.S.
FILED
MAY 24 2007
OFFICE OF THE CLERK

No. 06-1057

In the Supreme Court of the United States

CORUS STAAL BV, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
JEANNE E. DAVIDSON
PATRICIA M. MCCARTHY
CLAUDIA BURKE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the final results of the Department of Commerce's administrative review of antidumping duties, which petitioner concedes are consistent with the statute and the Department's policies at the time the results were issued, must be set aside because, while the case was pending on appeal, the Department announced that it would prospectively apply a different methodology for calculating dumping margins in initial antidumping investigations (which are not at issue here), but the Department has made clear that the new policy does not apply retroactively in administrative reviews of past entries.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 10
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Corus Staal, BV v. *Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023 (2006) 12

NLRB v. *Food Store Employees Union*, 417 U.S. 1 (1974) 18

Panhandle E. PipeLine Co. v. *FERC*, 890 F.2d 435 (5th Cir. 1989) 18

Timken Co. v. *United States*, 354 F.3d 1334 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004) 12, 13

Williston Basin Interstate Pipeline Co. v. *FERC*, 165 F.3d 54 (D.C. Cir. 1999) 18

Treaties, statutes and regulation:

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 3, 5, 7, 19

Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1226 (1994) 5

Art. 2.1, 33 I.L.M. 1226 5

Art. 3.7, 33 I.L.M. 1227 7

Treaties, statutes and regulation—Continued: Page

Art. 6, 33 I.L.M. 1230 5
Art. 17, 33 I.L.M. 1236 5
Art. 22, 33 I.L.M. 1239 7
Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.*) 3
19 U.S.C. 3511 3
19 U.S.C. 3511(a) 5
19 U.S.C. 3511(d)(16) 5
19 U.S.C. 3512(a)(1) 4
19 U.S.C. 3512(a)(2) 4
19 U.S.C. 3512(c)(1) 4, 19
19 U.S.C. 3512(d) 5
19 U.S.C. 3533 (§ 123) 5, 6, 13, 14
19 U.S.C. 3533(f)(3) 7
19 U.S.C. 3533(g)(1) 6, 19
19 U.S.C. 3533(g)(1)(A)-(E) 6
19 U.S.C. 3538 (§ 129) 6, 9, 14, 15, 17
19 U.S.C. 3538(b)(1) 6
19 U.S.C. 3538(b)(3) 6, 19
19 U.S.C. 3538(b)(4) 6, 7
19 U.S.C. 3538(c) (§ 129(c)) 15, 16
19 U.S.C. 3538(c)(1) 7
19 U.S.C. 3538(d) 19
19 U.S.C. 1673 2
19 U.S.C. 1673d(c)(1)(B) 2, 3
19 U.S.C. 1675 2
19 U.S.C. 1675(a)(2)(A) 3

Statutes and regulation—Continued: Page

19 U.S.C. 1675(a)(2)(C) 3
19 U.S.C. 1677(35)(A) 2
19 U.S.C. 1677(35)(B) 2, 3
19 U.S.C. 1677a(a) 2
19 U.S.C. 1677b(a)(1)(B)(i) 2
19 C.F.R. 351.212(c)(1) (2003) 3

Miscellaneous:

Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 66 Fed. Reg. 59,565 (2001) 7
Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. (2006):
p. 77,722 9
p. 77,725 ..... 10, 14
Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 72 Fed. Reg. (2007):
p. 28,676 10
p. 28,677 ..... 10, 16
Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands Amended Final Results of Antidumping Duty Administration Review, 69 Fed. Reg. 43,801 (2004) 8

Miscellaneous—Continued: Page

Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 69 Fed. Reg. 33,630 (2004) 8

72 Fed. Reg. 3783 (2007) 14

Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements and Revocation and Partial Revocation of Certain Antidumping Duty Orders, 72 Fed. Reg. (2007):

p. 25,261 ..... 10, 15

p. 25,262 ..... 10, 15

Issues and Decision Memorandum for the Final Results of the Section 129 Determinations (Apr. 9, 2007) <http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-0070410.pdf> .. 15

Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review (May 15, 2007) <http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf> ... 16, 17

Issues and Decisions Memorandum for the 2001-2002 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review (June 16, 2004) <http://ia.ita.doc.gov/frn/summary/netherlands/04-13495-1.pdf> 8

In the Supreme Court of the United States

No. 06-1057

CORUS STAAL BV, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a) is not published in the Federal Reporter but is reprinted in 186 Fed. Appx. 997. The opinion of the Court of International Trade (Pet. App. 3a-27a) is reported at 387 F. Supp.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. A petition for rehearing was denied on September 12, 2006 (Pet. App. 1a). On November 30, 2006, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including January 25, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Antidumping laws provide for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673. If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

If the Department of Commerce makes a final determination that merchandise is being sold in the United States at less than its fair value, the Department is required to determine an "estimated weighted average dumping margin." 19 U.S.C. 1673d(c)(1)(B). The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Under the Department of Commerce's long-standing construction of the statute, it only counted positive dumping margins when calculating aggregate dumping margins. If normal value did not "exceed[]" the export price, 19 U.S.C. 1677(35)(A), the Department concluded that there was no, or zero, "dumping margin," and thus nothing to include when summing the "aggregate dumping margin" that the statute specifies as the numerator

in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B).

Under the statutory scheme, once an affirmative dumping determination has been made, exporters and producers must then post a cash deposit or security for each entry in an amount based on their dumping margin. 19 U.S.C. 1673d(c)(1)(B). Before final liquidation of entries subject to an antidumping order, the statute provides that on an annual basis any interested party may request an administrative review of the antidumping duty. 19 U.S.C. 1675. The dumping margin that is determined during the course of that review then becomes the rate at which the entries subject to the review are liquidated as well as the basis for estimated antidumping duties on new entries. 19 U.S.C. 1675(a)(2)(A) and (C). Without a request for an administrative review, the Department of Commerce liquidates the merchandise at the cash deposit rates (*i.e.*, the deposit rates at the time of entry). See 19 C.F.R. 351.212(c)(i) (2003).

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Agreements (the Agreements), one of which is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), *reprinted in* 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453. Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.)*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for dealing with disputes concerning the consistency of domestic laws with the Agreements.

As a general matter, Congress emphasized the continuing primacy of domestic law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and domestic law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Agreements nor the fact of Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, disputes with respect to the United States' compliance with its obligations under the Agreements can be

brought only through the mechanisms provided in the Agreements themselves. See Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include bringing disputes before a World Trade Organization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding, Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO Member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific, when it enacted the URAA, about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, *supra*, at 659. Nor may a party ask a court to direct implementation of a WTO Report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two procedures by which a WTO report may be implemented in domestic law. The first method, set forth in Section 123 of the URAA, 19 U.S.C. 3533, establishes a procedure for amending, rescinding, or modifying an agency regulation or practice that a WTO report indicates is inconsistent with the Agreements, including the Antidumping

Agreement. Section 123(g) specifies that the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures detailed in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and to provide an opportunity for public comment, before determining whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(E).

A second procedure for implementing a WTO report in domestic law is set forth in Section 129 of the URAA, 19 U.S.C. 3538. Section 129 is narrower in scope than Section 123(g), and applies, *inter alia*, to the situation in which a WTO report indicates that a particular action by the Department of Commerce in an antidumping proceeding was not in conformity with the United States' obligations under the Antidumping Agreement. 19 U.S.C. 3538(b)(1). Like the statutory procedure under Section 123, Section 129 provides for consultation between USTR and relevant stakeholders before the USTR makes a determination whether and how to implement the WTO body report. 19 U.S.C. 3538(b)(3) and (d). Upon completion of this process, the USTR "*may* * * * direct the [Department] to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added). If the USTR requests that the Department issue a new determination and orders the Department to implement it under Section 129, that new determination applies only to "unliquidated entries of the subject mer-

chandise" that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs the Department to implement the new decision. 19 U.S.C. 3538(c)(1).

In the URAA, Congress made clear that the USTR could, after consultation, choose *not* to alter the administrative action that is the subject of an adverse WTO report, and may instead offer the complaining party trade compensation in some other form. 19 U.S.C. 3538(b)(4) (the USTR "may" direct implementation of new determination consistent with WTO report "in whole or in part"); H.R. Doc. No. 316, *supra*, at 1015; 19 U.S.C. 3533(f)(3) (requiring the USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation") (emphasis added). Importantly, the political branches could decide not to implement the new determination, but instead to compensate the complaining party in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, *supra*, at 1016.

3. Petitioner is a Dutch corporation, Corus Staal BV, that manufactures and exports steel products to the United States. In 2001, the Department of Commerce determined that hot-rolled steel from the Netherlands was being sold, or likely to be sold, in the United States at less than fair value and issued an antidumping duty order on November 29, 2001. *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565. On December 26, 2002, the Department initiated its first administrative review of that order, covering the period May 3, 2001, through October 31, 2002, and it issued the final results

of that administrative review on June 16, 2004. *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 33,630, as amended by, *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Amended Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 43,801 (2004). In the final results, the Department explained that it continued to treat petitioner's nondumped sales in the same manner that it had always treated nondumped sales—in other words, the Department did not offset dumped sales with non-dumped sales in the margin calculation. See *Issues and Decision Memorandum for the 2001-2002 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* 14 (June 16, 2004) <http://ia.ita.doc.gov/frn/summary/netherlands/04-13495-1.pdf>.

4. Petitioner challenged the Department of Commerce's methodology for calculating the dumping margin in the Court of International Trade, which upheld the final results of the Department's administrative review in an order dated July 19, 2005. Applying settled Federal Circuit precedent, the court held that the Department's methodology was a reasonable interpretation of the statutory provision governing the calculation of dumping margins. Pet. App. 12a-13a. The court rejected petitioner's contention that the Department's interpretation was unreasonable because it allegedly conflicted with a report issued by the WTO Appellate Body. *Id.* at 13a-15a. The court concluded that, until the political branches had fully determined whether and how to implement an adverse WTO report, the court must sustain the Department's methodology. *Ibid.* Moreover,

the court noted that, even if Commerce were to implement an adverse report and change its methodology with respect to the antidumping order underlying the administrative review, any determination to implement a change pursuant to 19 U.S.C. 3538 would only affect entries that were entered or withdrawn on or after the date upon which the USTR directs implementation. Pet. App. 16a-17a & nn.15, 16.

5. Petitioner appealed, and the United States Court of Appeals for the Federal Circuit affirmed in a judgment without opinion dated June 13, 2006. Pet. App. 2a. Petitioner sought rehearing on the ground that the United States had announced, shortly before the panel's order, that it would accept an adverse WTO report holding that the Department's practice of zeroing negative dumping margins in average-to-average price comparisons in antidumping investigations was inconsistent with the Antidumping Agreement. *Id.* at 65a. While petitioner recognized that the statutory scheme for implementing a WTO ruling had not yet been completed, it nonetheless urged the panel to vacate the administrative review final results on the basis of the USTR's announcement. *Id.* at 64a-70a. The court of appeals denied the petition for rehearing on September 12, 2006, without comment. *Id.* at 1a.

6. Subsequent to the court of appeals' judgment, the Department of Commerce has issued three determinations that address the United States' implementation of the WTO appellate body report upon which petitioner relies. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (2006) (*Section 123 Notice*); *Implementation of the Findings of the WTO Panel in US–Zeroing*

(EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25,261 (2007) (*Section 129 Implementation*); *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676 (2007) (*Fourth Administrative Review Final Results*). Each of those determinations specifies its temporal effect, and none applies the Department's new methodology retroactively to entries made at the time the antidumping order for petitioner's merchandise was in effect. See *Section 123 Notice*, 71 Fed. Reg. at 77,725 (new methodology applies to ongoing and future antidumping investigations); *Section 129 Implementation*, 72 Fed. Reg. at 25,262 (antidumping duty order revoked, but only "with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after" April 23, 2007); *Fourth Administrative Review Final Results*, 72 Fed. Reg. at 28,677 (directing Customs to liquidate entries during the fourth administrative review period (*i.e.*, November 1, 2004, to October 31, 2005) at an antidumping duty rate of 2.52%, despite the fact that the *Section 129 Implementation* had revoked petitioner's antidumping order prospectively).

ARGUMENT

Petitioner does not contend that the Department of Commerce's final results were inconsistent with law or the Department's established policies at the time those results were adopted. Rather, petitioner urges (Pet. 13-19) that the court of appeals erred by refusing to vacate those concededly proper results and remand the case to

the Department to consider whether to apply retroactively an intervening change in the Department's methodology for calculating antidumping duties in initial investigations. No such remand is necessary, because the Department has made clear that it has not changed its methodology as it applies to administrative reviews such as the one at issue in this case.

Through a very detailed statutory process, the Department has announced specific actions that it will take to implement the WTO rulings on which petitioner relies. In particular, the Department has determined that it will (1) utilize a new methodology for calculating dumping margins in pending and future antidumping investigations, and (2) revoke the antidumping order applicable to petitioner, but only with respect to entries made after the USTR's directive to implement that determination. Neither action casts doubt on the final results of the administrative review at issue here. Indeed, in another administrative review concerning the same antidumping order, the Department has expressly stated that, in administrative reviews under that order, the Department will continue to calculate dumping margins using the same zeroing methodology as it utilized in the past. Thus, even assuming that it would ever be appropriate for this Court to vacate properly issued final results in order for the Department to consider implementing a WTO report, this case would not present a proper occasion for such extraordinary relief. Further review by this Court is therefore unwarranted.

1. Petitioner does not dispute that the antidumping order issued with respect to its products in 2001 was valid and consistent with the law and policies of the Department at the time of its adoption. That question was finally determined in favor of the Department by the

Federal Circuit in *Corus Staal, BV* v. *Department of Commerce*, 395 F.3d 1343 (2005), and this Court denied review of that determination, 126 S. Ct. 1023 (2006). The Federal Circuit specifically upheld the Department's methodology of "zeroing" nondumped sales as "permissible in the context of administrative investigations," 395 F.3d at 1347, and rejected petitioner's contention that Commerce's otherwise reasonable construction of the statutory text should nonetheless be set aside because it was inconsistent with the United States' international obligations as construed by the WTO, *id.* at 1348-1349. The court of appeals observed that Congress had specifically precluded courts from giving effect to WTO reports except insofar as the USTR had determined to implement them. *Id.* at 1349 (Congress authorized the USTR "to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation").

Nor does petitioner contest that the Department's zeroing methodology is permissible under the statute in the context of periodic administrative reviews of antidumping orders. That issue was also conclusively resolved in the Department's favor by the Federal Circuit in *Timken Co.* v. *United States*, 354 F.3d 1334, cert. denied, 543 U.S. 976 (2004). There, in the context of an administrative review, the court of appeals held that, although the statute did not compel zeroing, *id.* at 1341-1342, the Department's "zeroing practice is a reasonable interpretation of the statutory language," *id.* at 1342. The court noted that the Department's construction "makes practical sense," had been upheld repeatedly by the Court of International Trade (both before and after the URAA), and "combats the problem of masked dump-

ing, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Id.* at 1342-1343.

2. Rather than challenging the validity of the final results at the time they were issued, petitioner urges the Court to vacate those results and remand the case to the Department in light of intervening determinations by the Department to change its methodology for calculating dumping margins in order to implement adverse WTO rulings. The premise of petitioner's argument is that "the computation method that supported issuance of the [initial antidumping] order [is] now abandoned" and the Department should be given an opportunity to address whether there is "any other basis on which the validity of the order can be maintained" or whether an administrative review can be based on an "order [that] was invalidly issued." Pet. 18.

That premise is incorrect. The Department has made very clear in its orders implementing the WTO reports that its change in methodology is only prospective in effect, and in no way calls into question the retroactive validity of the antidumping order that gave rise to the administrative review at issue in this case or the methodology applied in that administrative review. Thus, there is no basis for this Court to vacate the final results.

a. In support for its blanket assertion that the Department "announced its abandonment of zeroing," petitioner relies on the Department's notice that, pursuant to the statutory procedure in Section 123 of the URAA, 19 U.S.C. 3533, it would implement the WTO report. Pet. 9. Petitioner ignores, however, the salient fact that the Department specifically limited application of that change in policy to initial antidumping investigations still pending before the Department as of February 22,

2007. *Section 123 Notice*, 71 Fed. Reg. at 77,725 ("After careful consideration of the arguments presented by the commentors and the information needed to implement this change, and weighing the administrative burdens, the Department has determined to apply the final modification [in methodology] adopted through this proceeding to all *investigations pending before the Department as of the effective date.*") (emphasis added); 72 Fed. Reg. at 3783 (extending effective date to Feb. 22, 2007). Thus, the Section 123 determination does not in any way cast doubt on the validity of the antidumping order issued with respect to petitioner's products in 2001 (after *completion* of the relevant investigation) or on the first administrative review of that order, which the Department concluded in 2004.

b. Petitioner also relies on its prediction of how the government would implement the WTO report pursuant to Section 129 of the URAA, 19 U.S.C. 3538, with respect to petitioner's antidumping order in particular. Petitioner urges the Court to grant review on the basis of petitioner's assertion that the United States "committe[d] to the WTO to implement *in the instant antidumping proceeding* the abandonment of the zeroing methodology condemned" by the WTO. Pet. 18. See Pet. 18 n.13 ("Commerce recently has confirmed that *the change in policy will be applied to this proceeding.*") (emphasis added). There is no need, however, for the Court to rely on petitioner's prediction of how the Department would implement the WTO report or on petitioner's characterization of the government's international undertakings. The Department has already made clear that its prospective implementation of the WTO report does not render invalid the antidumping order at issue here or the methodology used to calculate peti-

tioner's dumping margin as part of the administrative review.

In its April 9, 2007, Issues and Decision Memorandum, which the *Section 129 Implementation* incorporates, 72 Fed. Reg. at 25,261, 25,262, the Department made clear that the determination to revoke an antidumping order pursuant to Section 129 does not mean that the order was "invalid under U.S. law." *Issues and Decision Memorandum for the Final Results of the Section 129 Determinations* 17 (*Section 129 Memorandum*) <http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf>. To the contrary, the order, "valid under U.S. law, remains in place up until the date on which USTR directs the Department" to revoke it and "all entries made prior to [that] date remain subject to potential liability for antidumping duties." *Ibid.* Consistent with that understanding, the *Section 129 Implementation* states that, "[p]ursuant to section 129(c), the new determination shall apply with respect to unliquidated entries of the subject merchandise *that are entered, or withdrawn from warehouse, for consumption on or after*" April 23, 2007, the date on which the USTR directed the Department to implement the new determination. 72 Fed. Reg. at 25,262 (emphasis added); 19 U.S.C. 3538(c). See *Section 129 Memorandum* 17 ("pursuant to the statute and the SAA, any revocations resulting from these section 129 proceedings will not apply to entries made before the date of USTR's direction").

c. Finally, petitioner contends (Pet. 18-19) that, despite Congress's specification that Section 129(c) determinations have only prospective effect, 19 U.S.C. 3538(c), which the Department confirmed in its *Section 129 Implementation*, the Court should nonetheless va-

cate and remand because the Department may have discretion, independent of Section 129(c), to apply its new methodology for calculating dumping margins retroactively to the present administrative review. Even if such speculation might conceivably provide a sufficient basis to vacate a concededly valid administrative ruling in a context in which there was some indication that the agency on remand might apply its new rule retrospectively, here there is no such indication. To the contrary, the Department has expressly stated that its new methodology for calculating dumping margins in initial antidumping investigations does *not* apply retroactively to administrative reviews of antidumping orders that were validly adopted and in place at the time of the entries concerned.

As noted above, in its recent *Fourth Administrative Review Final Results*, the Department determined that entries of petitioner's subject merchandise that occurred during the fourth administrative review period (2004-2005) are subject to the antidumping duty rate of 2.52 percent determined in that review, despite the fact that the *Section 129 Implementation* revoked petitioner's antidumping order prospectively. 72 Fed. Reg at 28,677. The *Fourth Administrative Review Final Results* adopted the Department's response to petitioner's retroactivity argument in the *Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* (May 15, 2007) (*Fourth Administrative Review Memorandum*) <http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf>. There, the Department made clear that "no change has yet been made with respect to the issue of 'zeroing' in administra-

tive reviews," and that therefore "the Department will continue with its current approach to calculating and assessing antidumping duties in this administrative review." *Id.* at 14.

Addressing the specific question raised by petitioner here (Pet. 18-19, 22)—namely, whether the Department would revise its methodology in administrative reviews in light of the *Section 129 Implementation* that revoked the antidumping order prospectively with respect to petitioner's merchandise—the Department expressly stated that it "is not altering its administrative review determination as a result of the post-[period of review] prospective revocation of the order." *Fourth Administrative Review Memorandum* 14. The Department noted both the "clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability." *Ibid.* The Department did not categorically preclude the possibility of exercising its discretion to modify a policy or practice in a future administrative review covering entries that pre-date the implementation of a Section 129 determination, even though a Section 129 determination applies only to future entries. In this case, however, the Department explained that "the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded" and the Department therefore "decline[d] to consider giving any broader retrospective effect to the revocation of the order" in these proceedings. *Ibid.*

The Department has made clear that neither its change of methodology for future initial antidumping investigations nor its prospective revocation of the antidumping order in these proceedings in implementa-

tion of the WTO report undermines the validity of the antidumping order or the Department's methodology for calculating dumping margins with respect to the entries at issue in this case. Thus, there is no need for this Court to remand in order "to permit the agency to consider fully the implementation issues which arise from" the Section 123 or 129 implementation determinations. Pet. 18-19. The Department's determinations make clear that there has been no "change in policy" that implicates the principle cited by petitioner, that a court should remand following an agency's change in policy in order to permit the agency to determine in the first instance the extent to which the policy change should be applied retroactively. Pet. 16-17 (citing *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974); *Panhandle Eastern Pipeline Co.* v. *FERC*, 890 F.2d 435, 438-449 & n.10 (5th Cir. 1989); *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999)).

3. Petitioner contends (Pet. 19) that the court of appeals' "failure to remand * * * directly implicates the United States' international obligations under the WTO Agreements." That argument has been rendered moot by the Department's determination to implement the WTO report without making retroactive changes to its methodology for calculating dumping margins in administrative reviews.

Petitioner properly recognizes "the importance of allowing the Executive Branch to take the primary role in implementing adverse WTO reports without interference from the Judiciary." Pet. 20-21. Such deference to the political branches is appropriate here not only in light of general separation-of-powers principles, but also under the comprehensive statutory scheme through which Congress ensured that only the Executive

Branch, in consultation with the Legislative Branch, would determine whether and to what extent the United States would implement adverse WTO determinations. See H.R. Doc. No. 316, *supra*, at 659 (specifying that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change" and that "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it"). See also 19 U.S.C. 3512(c)(1) (no person "may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with" the Uruguay Round Agreements); 19 U.S.C. 3533(g)(1) (any regulation or practice that a WTO body has found inconsistent with the Agreements "may not be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures set forth in the subsection have been complied with); 19 U.S.C. 3538(b)(3), (d) (providing for consultation between the USTR, Congress, and other relevant stakeholders before the USTR makes a determination whether and how to implement a WTO body report). Here, the Executive Branch has made clear that it does not intend to alter the methodology by which the Department calculates dumping margins on merchandise that entered the country subject to a valid antidumping order many years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

JEANNE E. DAVIDSON
PATRICIA M. MCCARTHY
CLAUDIA BURKE
Attorneys

MAY 2007

(4)

No. 06-1057

FILED
JUN 8 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CORUS STAAL BV,
Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

RICHARD OLAF CUNNINGHAM *
JOEL DENNIS KAUFMAN
ALICE ALEXANDRA KIPEL
JAMIE BENJAMIN BEABER
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 STATEMENT

Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Corus Nederland BV (formerly Koninklijke Hoogovens NV), which is 100% owned by Corus Group plc, which, effective April 2, 2007, is 100% owned by Tata Steel U.K. Limited, which is in turn 100% owned by Tata Steel Limited, a publicly owned and traded company listed on the Mumbai Stock Exchange, the National Stock Exchange of India, and the Calcutta Stock Exchange (an application for delisting pending before the latter exchange). Two companies exist which own 10% or more of Tata Steel Limited's outstanding stock: Tata Sons Limited and Life Insurance Corporation of India.

TABLE OF CONTENTS

	Page
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
ARGUMENT IN REPLY	1
CONCLUSION	10
APPENDIX A	
Department of Commerce *Federal Register* Notice of Implementation of the Findings of the WTO Panel in US—Zeroing	1a
APPENDIX B	
Department of Commerce Issues and Decision Memorandum for Final Section 129 Determination	14a
APPENDIX C	
Department of Commerce *Federal Register* Notice of Final Results of Antidumping Duty Administrative Review	55a
APPENDIX D	
Department of Commerce Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review	64a

TABLE OF AUTHORITIES

CASES Page

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 8

NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1 (1974) 1

Parkdale Int'l v. United States, 475 F.3d 1375 (Fed. Cir. 2007) 8

Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990) 8

STATUTES

19 U.S.C. § 3538 ..... *passim*

19 U.S.C. § 3533 ..... *passim*

LEGISLATIVE MATERIAL

Uruguay Round Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ..... 4, 6, 7, 10

AGENCY MATERIAL

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dep't of Commerce, Dec. 27, 2006) 2, 7

Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 72 Fed. Reg. 28,676 (Dep't of Commerce May 22, 2007) 3

TABLE OF AUTHORITIES—Continued

Page

Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Anti-dumping Duty Administrative Review, 72 Fed. Reg. 28,676, Issues and Decision Memorandum (Dep't of Commerce May 15, 2007), *available at*, http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf 6, 9, 10

Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 Fed. Reg. 9508, Issues and Decision Memorandum (Dep't of Commerce Feb. 23, 2007), *available at*, http://ia.ita. doc.gov/frn/summary/PRC/E7-3693-1.pdf 8

Final Results for the Section 129 Determinations, Issues and Decision Memorandum (Dep't of Commerce Apr. 9, 2007), *available at*, http://ia.ita.doc.gov/download /zeroing/ zeroing-sec-129-final-decision-memo-20070410.pdf 5

Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25,261 (Dep't of Commerce, May 4, 2007) 3

MISCELLANEOUS

United States—Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS/221 (Mar. 8, 2002) 6

REPLY BRIEF OF PETITIONER

The opposition briefs of the United States and of United States Steel Corporation ("U.S. Steel") are premised on a fundamental misinterpretation of the statutory scheme carefully crafted by Congress to govern implementation by the United States of rulings issued by the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO").[1] That misinterpretation is at the core of this case and, if not corrected by this Court, will have pernicious consequences of the highest importance. It will

- continue the divergence between the Court of Appeals for the Federal Circuit ("Federal Circuit") (whose decision is here at issue) and the Court of Appeals for the District of Columbia Circuit on the rule enunciated by this Court in *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974), that a reviewing court must remand following an intervening change in agency policy, for the agency to determine whether and how that change in policy will apply to the administrative decision undergoing judicial review;
- permit the Department of Commerce ("Commerce") to limit its implementation of WTO decisions in a manner directly contrary to U.S. law and to the expressed will of Congress; and
- give rise to continuing violation by the United States of its obligations under the WTO agreements relating to duties imposed under the antidumping and countervailing duty laws, with resultant conflict between the United States and its trading partners and potential authorization by the DSB of retaliation by those trading partners against the United States.

Specifically, the issue here is whether Commerce, in a review that depends entirely for its authority on the existence of a valid final determination of dumping, should be required

---

[1] Petitioner notes that on June 6, 2007 a petition for writ of certiorari presenting the same questions at issue herein was filed with the Court, styled *JTEKT Corporation, et. al. v. United States of America*, Petition For Writ of Certiorari (June 6, 2007).

to consider the effect on that review of a change in antidumping computation policy adopted by Commerce during the pendency of this appeal, where the effect of that change is to invalidate that final determination of dumping.

The issue raised by this petition is not, as the United States and U.S. Steel repeatedly mischaracterize it, whether the new policy enunciated by Commerce in its Section 123 determination[2] requires that a non-zeroed method of computation be used in the administrative review here on appeal.[3] Rather, petitioner contends that Commerce's new policy, by invalidating the affirmative final determination of dumping in this proceeding, deprives Commerce of the authority to impose antidumping duties on the basis of any computation, whether zeroed or not.

Neither the United States nor U.S. Steel contests the principle that an antidumping review may not be conducted, nor may antidumping duties be levied, in the absence of a valid affirmative determination of dumping. Nor does the United States or U.S. Steel contest the fact that Commerce's intervening change in policy (abandoning "zeroing" in the average-to-average computation of the weighted dumping margin), as applied to the investigation of dumping in this proceeding, invalidates the affirmative determination of dumping in this Dutch steel antidumping proceeding. In fact, Commerce has applied this change in policy to the Dutch Steel antidumping proceeding, has recalculated the weighted average dumping margin without zeroing, and has determined that petitioner was not dumping and that the affirmative antidumping determination reached in 2001 is therefore not

---

[2] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep't of Commerce, Dec. 27, 2006) (Petition App. 114a-128a).

[3] Petitioner does in fact believe that, for reasons other than the issues raised in this petition, a non-zeroed calculation should have been used.

valid.[4] On that basis, Commerce has revoked the antidumping duty order in this proceeding.[5]

While the United States and U.S. Steel maintain that the final antidumping determination in this proceeding was validly computed and validly issued in 2001, they do not contest that as of today that final antidumping determination is not valid. In fact, on that basis, Commerce determined in the fourth administrative review in this proceeding that instructions would not be issued to U.S. Customs and Border Protection requiring that it collect antidumping cash deposits in connection with petitioner's imports.[6]

Even though all of the foregoing is undisputed, and even though the new policy propounded by Commerce in its Section 123 determination has in fact been applied to the affirmative final determination of dumping in this proceeding and has invalidated that determination, the United States and U.S. Steel argue that there is no issue that Commerce can consider as to the application of its new policy, which was adopted under Section 123, to the administrative review here on appeal. Their basis for this contention is that determinations made under another WTO implementation provision, established under Section 129 of the Uruguay Round Agreements Act ("URAA"),[7] are to be applied "prospectively," and "prospectively" is defined differently for purposes of Section 129 than the normal definition of that term in the decisional

---

[4] *Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (Dep't of Commerce, May 4, 2007) (Reply App. 5a).

[5] *Id.*

[6] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676, 28,677 (Dep't of Commerce May 22, 2007) (Reply App. 62a).

[7] 19 U.S.C. § 3538(c)(1).

law governing policies propounded with respect to antidumping proceedings. Specifically, the United States and U.S. Steel point to the wording of Section 129 and to the discussion of Section 129 in the Statement of Administrative Action ("SAA") accompanying the URAA to support the proposition that if the United States Trade Representative ("USTR") requests that Commerce issue a new determination and orders Commerce to implement it under Section 129, that new determination applies only to "unliquidated entries of the subject merchandise" that are entered or withdrawn from warehouse for consumption on or after the date USTR directs Commerce to implement the new decision. 19 U.S.C. § 3538(c)(1).[8]

An administrative review deals with imports that were entered for consumption during the 12 months preceding the commencement of the review. Therefore, the imports covered by the final determining in the review here under appeal necessarily were entered for consumption prior to the date of the Section 129 implementation and were not covered by the Section 129 determination. Such "prior unliquidated entries" are, according to the SAA, simply not addressed by the action taken under Section 129, whether it be a change in computational methodology or a revocation of the antidumping order.[9]

But all of this is irrelevant to the issue raised by this petition, which relates to the absence of authority to impose antidumping duties that has been created by the Section 123 promulgation of a new policy that invalidates the affirmative determination of dumping. Petitioner does not contend that the Section 129 determination should have ordered the termination or rescission of this administrative review, or that it should have forbidden the issuance of antidumping duty liquidation instructions. The Section 129 determination had

---

[8] Brief for the United States in Opposition at 6-7.

[9] Uruguay Round Statement of Administrative Action at 1026, H.R. Doc. No. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313.

nothing to do with such decisions as to the prior unliquidated entries covered by this review. Those issues are to be decided in the review, applying the law now in existence, including the policy established in the Section 123 determination and the consequences of that policy under the decisional law governing application of newly-enunciated policies. It is precisely for that purpose that this review must be remanded to Commerce.

This petition argues that a remand is necessary to enable Commerce, in the annual review that addresses prior unliquidated imports that entered during the review period, to decide whether and how to apply to those entries the effects of the change in policy enunciated in Commerce's Section 123 determination. It cannot be argued in opposition, as the United States and U.S. Steel appear to contend, that this issue (or any other question relating to prior unliquidated entries) is addressed in the Section 129 process. Commerce itself made this clear in its "Issues and Decision Memorandum for the Final Results of the Section 129 Determination":

> Apart from confirming that the effect of the section 129 determinations will be prospective only, meaning that they will apply with respect to unliquidated entries made on or after the date on which USTR directs the Department to implement these determinations, the Department is taking no further position in these determinations. Because the treatment of any unliquidated entries made prior to the effective date of these determinations will not be governed by these determinations, such entries will be addressed through separate segments of these proceedings, as appropriate.[10]

---

[10] *Final Results for the Section 129 Determinations*, Issues and Decision Memorandum at 17 (Dep't of Commerce Apr. 9, 2007), *available at*, http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf (emphasis added) (Reply App. 41a). This position is identical to that represented by the United States to a WTO panel in defending Section 129 against a Canadian challenge that argued that Section 129 requires the United States to act in a WTO-inconsistent manner if it re-

Commerce reiterated this principle in connection with its final determination in the fourth administrative review of the Dutch Steel antidumping proceeding. In discussing whether the limitation of a Section 129 determination to future entries is dispositive of whether the Section 129 revocation of an order does or does not address whether antidumping duties can be assessed on prior unliquidated entries, Commerce explicitly recognized that it does not.

> Section 129 of the URAA is clear that any implemented determination resulting from such a proceeding is effective with respect to unliquidated entries that enter or are withdrawn from warehouse on or after the date that USTR directs the Department to implement the determination. That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated entries; however, the SAA makes clear that such entries remain subject to potential duty liability. SAA at 1026.[11]

Equally significant is the SAA statement referred to by Commerce, that after a Section 129 order revocation, prior unliquidated entries "would remain subject to potential duty liability."[12] Obviously, if Congress had wanted to make clear that, after a Section 129 order revocation, antidumping duties would be assessed on prior unliquidated entries, it would have

---

quires Commerce to impose antidumping duties after revocation of an antidumping order. Second Written Submission of the United States, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS/221 (Mar. 8, 2002) ("Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation . . . . Section 129(c)(1) . . . does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries . . . ." *Id.* ¶¶ 19, 20 (Petition App. 139a-140a)).

[11] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676, Issues and Decision Memorandum at 14 (Dep't of Commerce May 15, 2007) (emphasis added), *available at*, http://ia.ita.doc.gov/frn/summary/netherlands/ E7-9815-1.pdf (Reply App. 86a-87a).

[12] SAA at 1026 (emphasis added).

said exactly that. Instead, the insertion of the word "potential" can only be read to mean that whether such imports would be subject to antidumping duties would depend on determinations to be made in reviews, wholly apart from the Section 129 determination.

The fact is that the Section 129 determination did not address, much less dispose of, the question whether application of Commerce's new policy enunciated in the Section 123 determination has removed the authority for this review and for Commerce's order to liquidate antidumping duties.

In its final determination in the Section 123 proceeding, Commerce candidly and correctly stated the difference in applicability of Section 123 and Section 129 determinations:

> The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date. However, the SAA makes no such statement with respect to Section 123 modifications.[13]

This distinction is consistent with the different functions of the two implementation proceedings. Proceedings under Section 129 have the limited function of determining whether to modify a single discrete action taken by Commerce or the International Trade Commission. Given this narrow function, Congress reasonably determined to limit the applicability of the modification to future entries. Section 123, in contrast, effects a generalized change in U.S. law or agency policy and is not limited to a single agency decision or even a single proceeding. It is therefore logical that Congress did not create a special limitation of applicability to future import entries, but rather left Section 123 changes in law or agency policy to be governed by the normal rules of applicability.

The normal rules governing the applicability of a new policy announced by an administrative agency make it clear

---

[13] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,725 (Dep't of Commerce, Dec. 27, 2006) (Petition App. 125a-126a).

that such a new policy is to be applied to acts done by or decisions made by the agency after the promulgation of the new rule. With respect to new agency policies promulgated under the antidumping and countervailing duty laws, the rule is that such a new policy is to be applied to imports liquidated after the effective date of the new policy, without regard to the date on which the imports were entered for consumption.

In confirming that date of liquidation, not date of entry, is the touchstone for distinguishing between "prospectivity" and "restrospectivity" under the antidumping law, the Federal Circuit in *Parkdale Int'l v. United States*, 475 F.3d 1375 (Fed. Cir. 2007), emphasized the importance of applying newly-enunciated agency policies to ensure accurate calculation of antidumping margins:

> [A]n overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible, and this requires altering dumping rates to reflect changes in, inter alia, policy or commercial realities.[14]

This rationale has particular force in the present context, where failure to apply Commerce's new policy would permit assessment of duties at a time when no valid authority exists for such assessments. Indeed, Commerce itself has applied this test of retrospectivity to the scope of application of a new policy enunciated in a Section 123 proceeding.[15]

It is clear, therefore, that a central issue that must be decided in the review here under appeal has been created by

---

[14] 475 F.3d at 1380, *citing Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). This Court has held that a law or agency policy does not operate retrospectively merely because it is applied to past conduct, unless it "attaches new legal consequences" to the past conduct. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994).

[15] *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 Fed. Reg. 9508, Issues and Decision Memorandum at Cmt. 4 (Dep't of Commerce Feb. 23, 2007), *available at*, http://ia.ita. doc.gov/frn/summary/PRC/E7-3693-1.pdf.

the new policy adopted by Commerce during the pendency of this appeal. It is equally clear that applicability of this new policy to the issue of Commerce's continuing authority to impose antidumping duties in this review was not addressed, much less decided, in Commerce's Section 129 determination. It is also clear that the effects of a Section 123 change in agency policy are not limited in application to future import entries, but are instead applicable to any Commerce determination to impose or liquidate antidumping duties after the effective date of the Section 123 determination (here, February 22, 2007). It is therefore imperative that this Court grant certiorari to consider a remand to Commerce to determine, in the first instance, whether and how to apply its new policy to the appealed review.

Finally, it is simply wrong for the United States to contend that Commerce has resolved, in its final determination of the fourth administrative review of the Dutch steel antidumping proceeding, the issue of whether and how the new policy promulgated in its Section 123 determination affects the authority to impose antidumping duties in that review. Nothing in Commerce's final determination in that review[16] remotely suggests that any consideration was given to the effect of the Section 123 change in policy. Rather, Commerce's stated reason for determining that assessment of antidumping duties continues to be appropriate related entirely to the irrelevant question whether the Section 129 determination deprives Commerce of authority to impose duties:

- ". . . the Department notes that Section 129 of the URAA is clear that any implemented determination" is not effective as to prior unliquidated entries.[17]

---

[16] *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, Issues and Decision Memorandum at 12-14 (Dep't of Commerce May 15, 2007), *available at*, http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf (Reply App. 84a-87a).

[17] *Id.* at 14 (Reply App. 86a).

- "That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated entries; however, the SAA makes clear [in its discussion of Section 129] that such entries remain subject to potential duty liability. SAA at 1026."[18]
- "The combination of clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability . . . ."[19] These are references to Section 129, not to Section 123.

But even if it could be argued that Commerce has made a decision in another proceeding on the issue posed by this petition—whether the change in policy that invalidated the final antidumping determination deprives Commerce of authority to impose duties in this review—petitioner has the right to challenge that decision in this review. That alone requires a remand to the agency. This is especially important where the legal defect in Commerce's decision on that point is so obvious: after promulgating a new policy, Commerce, instead of basing its decision on whether the effect of that policy should be applied to prior unliquidated entries, has simply stated that "the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded. For these reasons, the Department declines to consider giving any broader retrospective effect to the revocation of the order."[20] An administrative agency that has promulgated a new rule or policy is not free to say "we don't like our own new policy and we decline to apply it."

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant this petition for a writ of certiorari.

---

[18] *Id.* (Reply App. 86a-87a).

[19] *Id.* (Reply App. 87a).

[20] *Id.*

Respectfully submitted,

RICHARD OLAF CUNNINGHAM *
JOEL DENNIS KAUFMAN
ALICE ALEXANDRA KIPEL
JAMIE BENJAMIN BEABER
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record

Counsel for Petitioner

June 8, 2007

APPENDIX

APPENDIX A

FEDERAL REGISTER

Vol. 72, No. 086

Notices

DEPARTMENT OF COMMERCE (DOC)

International Trade Administration (ITA)

Import Administration

Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders

---

72 FR 25261

DATE: Friday, May 4, 2007

SUMMARY: On April 23, 2007, the U.S. Trade Representative instructed the Department of Commerce (the Department) to implement its findings under section 129 of the Uruguay Round Agreements Act (URAA) regarding the offsetting of dumped sales with non-dumped sales in investigations involving average-to-average transactions. The Department issued its findings on April 9, 2007, regarding eleven investigations challenged by the European Communities before the World Trade Organization. The Department is now implementing those findings.

DATES: The effective date of these determinations is April 23, 2007.

FOR FURTHER INFORMATION CONTACT: Daniel O'Brien, William Kovatch, or Michael Rill, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW.,

Washington, DC 20230; telephone: (202) 482-1376, (202) 482-5052, or (202) 482-3058, respectively.

SUPPLEMENTARY INFORMATION: On February 22, 2007, the Department initiated twelve proceedings under section 129 of the URAA to implement the WTO dispute settlement panel's report in United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (WT/DS294). In each proceeding, the Department recalculated the weighted-average dumping margin from the following antidumping investigations, applying the calculation methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification; see* 71 FR 77722 (December 27, 2006):

1. Certain Hot-Rolled Carbon Steel from the Netherlands (A-421-807).
2. Stainless Steel Bar From France (A-427-820).
3. Stainless Steel Bar From Germany (A-428-830).
4. Stainless Steel Bar From Italy (A-475-829).
5. Stainless Steel Bar From the United Kingdom (A-412-822).
6. Stainless Steel Wire Rod From Sweden (A-401-806).
7. Stainless Steel Wire Rod From Spain (A-469-807).
8. Stainless Steel Wire Rod From Italy (A-475-820).
9. Certain Stainless Steel Plate in Coils from Belgium (A-423-808).
10. Stainless Steel Sheet and Strip in Coils from Italy (A-475-824).
11. Certain Cut-to-Length Carbon-quality Steel Plate From Italy (A-475-826).

12. Certain Pasta From Italy (A-475-818).

On February 26, 2007, the Department issued its preliminary results and requested comments. After receiving comments and rebuttal comments from the interested parties, the Department issued its Final Results for the Section 129 Determinations in eleven of the twelve proceedings on April 9, 2007.[1]

On April 20, 2007, consistent with section 129(b)(3) of the URAA, the U.S. Trade Representative held consultations with the Department and the appropriate congressional committees with respect to these determinations. On April 23, 2007, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, the U.S. Trade Representative directed the Department to implement these determinations.

Nature of the Proceedings

Section 129 of the URAA governs the nature and effect of determinations issued by the Department to implement findings by WTO dispute settlement panels and the Appellate Body. Specifically, section 129(b)(2) provides that "notwithstanding any provision of the Tariff Act of 1930," within 180 days of a written request from the U.S. Trade Representative, the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. See 19 U.S.C. 3538(b)(2). The Statement of Administrative Action, U.R.A.A., H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA), variously refers to such a determination by the Department as a "new," "second," and

---

[1] With respect to Stainless Steel Sheet and Strip in Coils from Italy (A-475-824), one interested party made allegations of computational errors in calculating the weighted-average dumping margin. The Department found that there was a reasonable basis to investigate the allegations further, and postponed its decision in that proceeding in order to place additional information on the administrative record, and allow interested parties additional time to comment.

"different" determination. See SAA at 1025, 1027. After consulting with the Department and the appropriate congressional committees, the U.S. Trade Representative may direct the Department to implement, in whole or in part, the new determination made under section 129. See 19 U.S.C. 3538(b)(4). Pursuant to section 129(c), the new determination shall apply with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative directs the Department to implement the new determination. See 19 U.S.C. 3538(c). The new determination is subject to judicial review separate and apart from judicial review of the Department's original determination. See 19 U.S.C. 1516a (a) (2) (B) (vii).

Analysis of Comments Received

The issues raised in the case and rebuttal briefs submitted by interested parties to these proceedings are addressed in the Issues and Decision Memorandum for the Final Results of the Section 129 Determinations, from Stephen J. Claeys to David M. Spooner, dated April 9, 2007 (Issues and Decision Memorandum), which is hereby adopted by this notice. The Issues and Decisions Memorandum is on file in the Central Records Unit (CRU), room B-099 of the Department of Commerce main building and can be accessed directly at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the Issues and Decisions Memorandum are identical in content. A list of the issues addressed in the Issues and Decisions Memorandum is appended to this notice.

Final Antidumping Margins

The recalculated margins, unchanged from the Preliminary Results for all cases, except the investigation of Stainless Steel Sheet and Strip in Coils from Italy, are as follows:

(1) Certain Hot-Rolled Carbon Steel From the Netherlands

- The margin for Corus, the sole respondent, decreases from 2.59 percent to zero. Since Corus was the only respondent in the investigation, we are now revoking this order effective April 23, 2007 (the effective date).

(2) Stainless Steel Bar From France

- The margin for UGITECH decreases from 3.9 percent to zero. We are now revoking this order for UGITECH effective April 23, 2007 (the effective date).
- The margin for Aubert and Duval S.A. was based on total AFA. This margin does not change as a result of this proceeding.
- Since there are no non-AFA, above *de minimis* margins remaining, pursuant to Department practice, the all others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 3.9 percent to 35.92 percent.

(3) Stainless Steel Bar From Germany

- The margin for BGH decreases from 13.63 percent to 2.59 percent.
- The margin for Einsal decreases from 4.17 percent to *de minimis*. We are now revoking this order for Einsal effective April 23, 2007 (the effective date).
- The margin for Edelstahl Witten-Krefeld GmbH decreases from 15.40 percent to 10.82 percent.

- The margin for Krupp Edelstahlprofile GmbH decreases from 32.32 percent to 31.25 percent.
- The all-others rate changes from 16.96 percent to 15.16 percent.

(4) Stainless Steel Bar From Italy

- The margin for Acciaiera Valbruna S.p.A. decreases from 2.50 percent to zero. We are now revoking this order for Acciaiera Valbruna S.p.A. effective April 23, 2007 (the effective date).
- The margin for Acciaiera Foroni S.p.A. decreases from 7.07 percent to zero. We are now revoking this order for Acciaiera Foroni S.p.A. effective April 23, 2007 (the effective date).
- Trafilerie Bedini S.r.l. was excluded from the order and that does not change as a result of this proceeding.
- The margin for Cogne Acciai Speciali Srl was based on total AFA. This margin does not change as a result of this proceeding.
- The margin for Rodacciai S.p.A. decreases from 3.83 percent to zero. We are now revoking this order for Rodacciai S.p.A. effective April 23, 2007 (the effective date).
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 3.81 percent to 6.60 percent.

(5) Stainless Steel Bar From the United Kingdom

- The margin for Corus Engineering Steels Ltd. decreases from 4.48 percent to zero. We are now revoking this order for Corus Engineering Steels Ltd. effective April 23, 2007 (the effective date).

- Firth Rixon Special Steels Ltd. and Crownridge Stainless Steel Ltd.'s/Valkia Ltd.'s margins were based on total AFA. These margins do not change as a result of this proceeding.
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 4.48 percent to 83.85 percent.

(6) Stainless Steel Wire Rod From Sweden

- The margin for Fagersta Stainless AB decreases from 5.71 percent to zero. Since Fagersta Stainless AB was the only respondent in the investigation, we are now revoking this order effective April 23, 2007 (the effective date).

(7) Stainless Steel Wire Rod From Spain

- The margin for Roldan S.A., the sole respondent, decreases from 4.76 percent to 2.71 percent.
- The all-others rate changes from 4.76 percent to 2.71 percent.

(8) Stainless Steel Wire Rod From Italy

- The margin for Cogne Acciai Speciali S.r.l. decreases from 12.73 percent to 11.25 percent.
- Acciaiera Valbruna S.p.A. was excluded from the order and that does not change as a result of this proceeding.
- The all-others rate changes from 12.73 percent to 11.25 percent.

(9) Stainless Steel Plate in Coils From Belgium

- The margin for Ugine & ALZ Belgium (formerly ALZ N.V.), the sole respondent, decreases from 9.84 percent to 8.54 percent.
- The all-others rate changes from 9.84 percent to 8.54 percent.

(10) Certain Cut-To-Length Carbon-Quality Steel Plate Products From Italy

- The margin for Palini and Bertoli S.p.A. decreases from 7.85 percent to 7.64 percent.
- ILVA S.p.A. was excluded from the order and that does not change as a result of this proceeding.
- The all-others rate changes from 7.85 percent to 7.64 percent.

(11) Certain Pasta From Italy

- The margin for Arrighi S.p.A. Industrie Alimentari decreases from 21.34 percent to 20.84 percent.
- The margin for Liguori Pastificio Dal 1820 S.p.A. decreases from 12.41 percent to 12.14 percent.
- The margin for Pastificio Fratelli Pagani S.p.A. decreases from 18.30 percent to 18.23 percent.
- The margin for La Molisana Industrie Alimentari S.p.A. remains at 14.78 percent based on this recalculation.
- De Matteis Agroalimentare S.p.A. and Delverde S.r.l. were excluded from the order and that does not change as a result of this proceeding.
- F.lli De Cecco de Filippo Fara San Martino S.p.A.'s margin was based on total AFA. This margin does not change as a result of this proceeding.

- The all-others rate changes from 12.09 percent to 16.51 percent. We note that Delverde S.r.l.'s margin in the investigation was a component of the all-others rate. However, since Delverde S.r.l. was later revoked from the order as a result of litigation relating to the investigation, its margin is no longer a component of the all others rate. We note also that, for cash deposit purposes, we deduct from the margin of dumping any export subsidies. On that basis, the new cash deposit rate that will be established for all others is 15.45 percent.

Revocations, Cash Deposits and Continuation of the Suspension of Liquidation

On April 23, 2007, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, the U.S. Trade Representative, after consulting with the Department and Congress, directed the Department to implement these determinations.

With respect to Certain Hot-Rolled Carbon Steel from the Netherlands and Stainless Steel Wire Rod from Sweden, we will instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping duties entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties.

With respect to Stainless Steel Bar from France, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by UGITECH, entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require

a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Bar from Germany, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by Einsal, entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Bar from Italy, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by Acciaiera Valbruna S.p.A., Acciaiera Foroni S.p.A. and Rodacciai S.p.A., entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of

liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Bar from the United Kingdom, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by Corus Engineering Steels Ltd., entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Wire Rod from Spain, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Wire Rod from Italy, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to

the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Plate in Coils from Belgium, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Certain Cut-To-Length Carbon-Quality Steel Plate Products from Italy, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Certain Pasta from Italy, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters

of subject merchandise for whom the Department has not calculated an individual rate.

The cash deposit rates will remain unchanged for those companies that we are not revoking and whose cash deposit rates since the original investigation have been superseded by administrative reviews.

These Section 129 Determinations are issued and published in accordance with section 129(c)(2)(A) of the URAA.

Dated: April 30, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix I

Issues Raised in the Issues and Decision Memorandum

Comment 1: Whether the Department Has the Authority to Implement the WTO Appellate Body Decision Comment 2: Targeted Dumping

Comment 3: Treatment of Unliquidated Entries

Comment 4: Calculation of All-Others Rate

Comment 5: Clerical Error Allegation in the Investigation of Stainless Steel Sheet and Strip in Coils from Italy

Comment 6: Clarification of Valbruna Exporter Name

Comment 7: The Department's Briefing Schedule

APPENDIX B

Section 129 Determinations

Public Document

A-122-838, A-421-807, A-427-820,
A-428,830, A-475-829, A-412-822,
A-401-806, A-469-807, A-475-820,
A-423-808, A-475-824, A-475-818

April 9, 2007

MEMORANDUM

TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

RE: Final Results for the Section 129 Determinations: Certain Hot-rolled Carbon Steel from the Netherlands, Stainless Steel Bar from France, Stainless Steel Bar from Germany, Stainless Steel Bar from Italy, Stainless Steel Bar from the United Kingdom, Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Spain, Stainless Steel Wire Rod from Italy, Certain Stainless Steel Plate in Coils from Belgium, Stainless Steel Sheet and Strip in Coils from Italy, Certain Cut-ToLength Carbon-Quality Steel Plate Products from Italy, Certain Pasta from Italy

SUBJECT: Issues and Decision Memorandum for the Final Results of the Section 129 Determinations

Summary

This memorandum addresses issues briefed in the above-referenced section 129 proceedings. Below is a complete list of the issues in this proceeding for which we have received comments from the parties:

Comment 1: Whether the Department of Commerce (the Department) Has the Authority to Implement the WTO Appellate Body Decision

Comment 2: Targeted Dumping

Comment 3: Treatment of Unliquidated Entries Comment 4: Calculation of All-Others Rate

Comment 5: Clerical Error Allegation in the Investigation of Stainless Steel Sheet and Strip in Coils from Italy

Comment 6: Clarification of Valbruna Exporter Name Comment 7: The Department's Briefing Schedule

Background

On February 16, 2004, the European Communities ("EC") requested the establishment of a World Trade Organization (WTO) dispute settlement panel ("the Panel") challenging, among other things, the final determinations of fifteen anti-dumping duty investigations concluded by the Department. The Panel circulated its report on October 31, 2005, finding that the Department's calculation of the margins of dumping when using the average-to-average comparison methodology in the fifteen investigations was inconsistent with U.S. obligations under the WTO agreements. *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (October 31, 2005) (*"US—Zeroing (EC)"*). The United States did not appeal this aspect of the Panel's report. On March 6, 2006, the Department

published a notice in the Federal Register proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006).

The EC and the United States appealed other aspects of the Panel's report not relevant to these proceedings. The WTO Appellate Body issued its report on April 18, 2006, addressing those aspects of the Panel's report appealed by the EC and the United States. *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (April 18, 2006). The Panel's finding concerning the fifteen investigations involving EC member countries, however, remained unchanged.

On May 9, 2006, the WTO Dispute Settlement Body ("DSB") adopted the Panel's report as modified by the Appellate Body report. On May 30, 2006, the United States indicated to the DSB that the United States intends to implement the DSB's recommendations and rulings.

Pursuant to the Panel's findings in *US—Zeroing (EC)*, the Department published its final modification, adopting its March 6, 2006, proposal. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) ("Final Modification").

The Department is conducting "Section 129 Determinations" with respect to twelve different antidumping investigations involving certain products originating in various member

states of the EC,[1] and applying the Final Modification to those proceedings.

On February 26, 2007, the Department issued the Preliminary Results for these Section 129 Determinations. See Memorandum from Stephen J. Claeys, Deputy Assistant Secretary, to David M. Spooner, Assistant Secretary, Regarding Section 129 Determinations: Calculation of the Weighted-Average Margins (Preliminary Results). In the Preliminary Results, the Department determined to implement the recommendations and rulings of the DSB by offsetting dumped sales with non-dumped sales in the challenged investigations as explained in the Final Modification.

We received case briefs and/or rebuttal briefs, respectively, from the following parties:

- Several domestic interested parties (hereinafter referenced as "the steel and pasta petitioners"), in the following investigations:
    - Carpenter Technology Corporation, Crucible Speciality Metal Division, Crucible Materials Corporation, Electralloy Corporation, a Division of G.O. Carlson, Inc., and Universal Stainless & Alloy Products, Inc. in the investigation of Stainless Steel Bar from Italy;

---

[1] Although the EC challenged fifteen antidumping investigations, the Department revoked the antidumping duty order associated with three of those investigations: Certain Cut-to-Length Carbon-Quality Steel Plate from France (A-427-816). Revocation of Antidumping Duty Order: Certain Cut-To-Length Carbon-Quality Steel Plate from France, 70 FR 72787 (December 7, 2005); Certain Stainless Steel Sheet and Strip in Coils from France and the United Kingdom; Final Results of Sunset Reviews and Revocation of Antidumping Duty Order, 70 FR 44894 (August 4, 2005). Because a Section 129 Determination affects only entries made on or after the date on which USTR instructs the Department to implement the determination, there is no need to issue Section 129 Determinations with respect to these three investigations.

- Carpenter Technology Corporation, Crucible Speciality Metal Division, Crucible Materials Corporation, Electralloy Corporation, a Division of G.O. Carlson, Inc., Universal Stainless & Alloy Products, Inc., and Valbruna Slate Steels Inc. in the investigations of Stainless Steel Bar from France, Germany and the United Kingdom ;

- Carpenter Technology Corporation and Universal Stainless & Alloy Products, Inc. in the investigations of Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Italy, and Stainless Steel Wire Rod from Spain;

- New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company in the investigation of Certain Pasta from Italy; and

- Allegheny Ludlum and AK Steel Corporation in the investigations of Stainless Steel Sheet and Strip in Coils and Italy and Stainless Steel Plate in Coils from Belgium.

- Nucor Corporation (Nucor) in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands and the investigation of Cut-to-Length Carbon-Quality Steel Plate from Italy

- IPSCO Steel Inc. Steel Dynamics and Gallatin Steel (IPSCO, Steel Dynamics and Gallatin)in the investigations of Certain Cut-to-Length Carbon-Quality Steel Plate from Italy and Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

- United States Steel Corporation (U. S. Steel), in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

- Mittal Steel USA, Inc. (Mittal USA) in the investigations of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands and Cut-to-Length Carbon-Quality Steel Plate from Italy
- UGITECH S.A (Italy) and UGITECH S.A. (UGITECH) in the investigations of Stainless Steel Bar from Italy and Stainless Steel Bar from France, respectively
- ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA (TKAST) in the investigation of Stainless Steel Sheet and Strip in Coils from Italy
- Fagersta Stainless AB (Fagersta) in the investigation of Stainless Steel Wire Rod from Sweden
- Acciaierie Valbruna S.p.A. (Valbruna) in the investigation of Stainless Steel Bar from Italy
- Corus Staal BV (Corus) in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands
- The Government of the United Kingdom in the investigation of Stainless Steel Bar from the United Kingdom
- The European Commission in all investigations
- The Government of France in the investigation of Stainless Steel Bar from France
- BGH Edelstahl Freital GmbH, BGH Edelstahl Lippendorf GmbH, BGH Edelstahl Lugau GmbH and BGH Edelstahl Siegen Gmbh (BGH) in the investigation of Stainless Steel Bar from Germany
- Foroni S.p.A. and Foroni Metals of Texas, Inc. (collectively, Foroni), in the investigation of Stainless Steel Bar from Italy

- Walzwerke Einsal Gmbh (Einsal), in the investigation of Stainless Steel Bar from Germany
- Rodacciai S.p.A. (Rodacciai), in the investigation of Stainless Steel Bar from Italy

Nucor, a domestic interested party, requested a hearing in the investigation of Certain Carbon Steel Flat Products from the Netherlands. Nucor withdrew its request on March 30, 2007. TKAST requested a hearing in the investigation of Stainless Steel Sheet and Strip in Coils from Italy. A hearing was held in this section 129 proceeding on April 6, 2007.

DISCUSSION OF ISSUES

Comment 1: Whether the Department Should Implement, and Has the Authority to Implement, the WTO Appellate Body Decision

DISCUSSION OF CASE BRIEFS

The steel and pasta petitioners argue that the WTO Appellate Body's assertion that "zeroing" is inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1, 9.3, 9.5, 11, 18.3, and 18.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs on Trade 1994 (AD Agreement), Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article XVI:4 of the WTO Agreement is wrong. The steel and pasta petitioners contend that the United States, in compliance with the URAA, codified a new provision, section 771(35) of the Tariff Act of 1930, as amended (the Act), which defines "dumping margin" and "weighted-average dumping margin." According to the steel and pasta petitioners, this section of the Act indicates that an item is considered to have been dumped when normal value exceeds the export price or constructed export price, and that when export price or constructed export price is not below normal value then no dumping has occurred.

The steel and pasta petitioners also argue that, in past negotiations, the WTO Members have permitted "zeroing." The steel and pasta petitioners contend that the Appellate Body has only been able to attack "zeroing" by legislating new rights and obligations, rather than interpreting the Members' negotiated rights and obligations. The steel and pasta petitioners also note the criticisms made by the United States against the Appellate Body's recent findings on "zeroing."

The steel and pasta petitioners contend that the Department has failed to explain whether its change to its longstanding practice is consistent with U.S. law. According to the steel and pasta petitioners, the Department has only stated that the Courts have not found that zeroing was mandated by the statute. However, the steel and pasta petitioners argue that the Courts have approved the Department's practice of "zeroing."

The steel and pasta petitioners argue that the Department must specifically explain if it agrees with the Appellate Body's decision, and if this decision is in accordance with U. S. law. Moreover, the steel and pasta petitioners assert that, if the Department believes that the Appellate Body decision violates U.S. law, the Department must state whether it is nevertheless required to implement this decision. If the Department does not believe that U. S. law permits it to stop "zeroing", or cannot explain this policy, but nevertheless implements the Appellate Body decision, the steel and pasta petitioners contend, then the "Executive Branch will be engaging in unconstitutional legislative action."

Mittal USA argues that the Court of Appeals for the Federal Circuit (CAFC), in *Timken v. U. S.*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (*Timken*) erred in finding that "zeroing" was not required by the statute. According to Mittal USA, there can only be a "dumping margin" when there is "dumping." For Mittal USA, negative values cannot result in dumping margins and thus should not be included in the weighted-average dumping margin. In support, Mittal USA points to 19

U.S.C. 1677(35)(A) and (B) {sections 771(35)(A) and (B) of the Act} (a dumping margin is "determined by dividing the aggregate *dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer") and 19 USC 1673c(b)(2) {section 734(b)(2) of the Act}, a provision that allows the Department to suspend an investigation if the exporters of the subject merchandise agree "to revise their prices to eliminate completely any amount by which normal value exceeds the export price (or constructed export price) of that merchandise." Moreover, Mittal USA argues, 19 U.S.C. 1677(34) {section 771(34) of the Act} "specifies that the terms 'dumped' and 'dumping' refer to sales or likely sales at less than fair value." Mittal USA contends that the Court in *Timken* did not address the context for the interpretation of the word "exceeds" in 19 U.S.C. 1673c(b)(2) {section 734(b)(2) of the Act}. Mittal USA also contends that not zeroing would result in the same margin regardless of whether weighted average or individual U.S. transaction prices are compared to a weighted average normal value, thus rendering the Department's authority to address "targeted dumping" meaningless. Moreover, Mittal USA argues, it is not permissible for the Department to interpret the statute as allowing for zeroing under one methodology but not another.

IPSCO, Steel Dynamics and Gallatin assert that the term "dumping margin" is clearly defined by the statute as the amount by which the normal value exceeds the export price. IPSCO, Steel Dynamics and Gallatin cite the CAFC's decision in *Timken* and argues that unlike the word "exceeds," which the CAFC found "does not unambiguously preclude the calculation of a negative dumping margin," the definition of "dumping margin" in the statute identifies "normal value" first in the equation and "export price" second in the equation. Therefore, according to IPSCO, Steel Dynamics and Gallatin, "when the full statutory definition of the dumping

margin is interpreted, it is clear the offset cannot be included in the statutory definition of the dumping margin."

In further discussion of the *Timken* decision, IPSCO, Steel Dynamics and Gallatin argue that neither the CAFC, nor any other U.S. court, has ever ruled that it would be reasonable to offset dumped sales by non-dumped sales. IPSCO, Steel Dynamics and Gallatin contend that this new policy would effectively establish a credit for assessment which was not contemplated by the statute. IPSCO, Steel Dynamics and Gallatin argue this is the case because U.S. law equates the dumping margin to the assessment amount at 19 U.S.C. 1675(a) {section 752 of the Act}. IPSCO, Steel Dynamics and Gallatin note that this case involves dumping margins in investigations and not reviews, to which 19 U.S.C. 1675(a) pertains; however, IPSCO, Steel Dynamics and Gallatin argue, the issue of whether the offset is part of the dumping margin is the same in investigations and reviews. Since the statutory definition is the same in investigations as in reviews, IPSCO, Steel Dynamics and Gallatin assert, the Department's new practice clearly violates the Department's requirement to determine a dumping margin for each entry in reviews. IPSCO, Steel Dynamics and Gallatin contend that the Department's new practice also violates the Statement of Administrative Action's (SAA) statement of methodology for calculating the dumping margin in investigations.

IPSCO, Steel Dynamics and Gallatin assert that the WTO decision that the Department offset dumped sales by non-dumped sales is outside of its scope because it is not based on the language of the AD Agreement. In particular, IPSCO, Steel Dynamics and Gallatin note that the term "dumping" is defined in the AD Agreement in a manner nearly identical to that in U.S. law in that it defines dumping as occurring when the export price is less than the normal value. IPSCO, Steel Dynamics and Gallatin note that the AD Agreement does not speak to calculating dumping based on "a product as a whole"

as the Appellate Body found. This finding, IPSCO, Steel Dynamics and Gallatin assert, indicates that the Appellate Body "pursues its own trade agenda" and is "dishonest, deceitful, and cannot be trusted." IPSCO, Steel Dynamics and Gallatin assert that it is generally impossible to make a meaningful comparison of normal value and export price at the level of the "product as a whole."

IPSCO, Steel Dynamics and Gallatin argue that Article 17.6(ii) of the AD Agreement specifies that there may be provisions that allow for "more than one permissible interpretation." In this case, IPSCO, Steel Dynamics and Gallatin aver, the Appellate Body has ruled that the only permissible interpretation is its offset scheme. IPSCO, Steel Dynamics and Gallatin note that the transaction-to-transaction methodology has also been found impermissible by the Appellate Body.

U.S. Steel asserts that a complete reading of the statute, in particular 19 U.S.C. 1677f-1(d) {section 771A(d) of the Act}, makes it clear "beyond all doubt that the statute mandates the denial of offsets." U.S. Steel argues that this is the case because a respondent's dumping margin would always be the same regardless of whether weighted average or individual U.S. transaction prices are compared to a weighted average normal value. Such an outcome would have rendered Congress' actions "pointless," U.S. Steel avers, in providing for the different comparison methods in the statute. According to U.S. Steel, "this undeniable fact conclusively demonstrates that Congress intended for the Department not to offset dumping margins with non-dumped sales." U.S. Steel asserts that the United States and three separate WTO panels have recognized the truth of this principle, and that the statute "cannot be construed to contain a meaningless provision."

Corus argues that the Department was correct to offset dumped sales with non-dumped sales in the Preliminary Results. Corus avers that "as a result of *US—Zeroing (EC)*,

the Department is obligated to redetermine the margin for the Dutch Steel AD Investigation without zeroing."

DISCUSSION OF REBUTTAL BRIEFS

U.S. Steel argues that Corus is "flatly wrong" in contending that the Department was correct to apply offsets for non-dumped sales in the Preliminary Results. U.S. Steel affirms that WTO decisions like *US—Zeroing (EC)* are not binding on the United States. Moreover, U.S. Steel contends, U.S. law does not permit the Department to apply offsets for non-dumped sales.

Nucor expresses support for arguments made by other domestic interested parties regarding why it was impermissible under the statute for the Department to abandon its "zeroing" practice. Nucor affirms that "the Department cannot alter the methodology until Congress changes the law."

Corus asserts that domestic interested parties' arguments that the statute requires "zeroing" and that Congress must amend the law for the Department not to "zero" are "devoid of any legal support" and contradict arguments made by the Department itself before the CIT regarding the absence of statutory language mandating zeroing. Corus contends that both the CIT and CAFC have clearly stated that the statute does not mandate "zeroing." Corus argues that the Department, under the principle of *stare decisis*, is now bound by these decisions, and has in fact implemented its new policy in the recent final determination of activated carbon from China. Corus also argues that, assuming the domestic interested parties were correct that the Department in not bound by CAFC precedent, the domestic interested parties' arguments are "nevertheless unavailing." Corus contends that the CAFC has found that the word "exceeds" in 19 U.S.C. 1677(35)(A) allows for both positive and negative numbers. Corus further argues that because Mittal has found a provision in the statute where the word "exceeds" may only be used to refer to

positive amounts "does not detract from the *Timken* court's analysis of the term in a different context." Corus cites Supreme Court decisions in *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) and *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) in support of its contention that "because 'exceeds' is not a defined term, it need not be given a single interpretation."

Valbruna and Foroni argue that the Department clearly has the authority to offset dumped sales with non-dumped sales and that several court decisions, particularly the *Timken* decision, belie the domestic interested parties' claims that "zeroing" is mandated by the statute. Foroni also asserts that the "Department has no discretion" but to implement the WTO panel's report once it has received a written request from USTR to do so.

BGH argues that the Department's "change in methodology is the result of a long and thorough process." BGH contends that it is not inappropriate for the Department to modify its practice to bring it into conformity with the AD Agreement. Moreover, BGH argues, the Department has already addressed the issue of a Congressional amendment to allow it to offset dumped sales with non-dumped sales.

Einsal, Fagersta, and Rodacciai argue that the steel and pasta petitioners' "platitudes about the Appellate Body 'disregarding its charter' and 'disrupting the constitutional balance of the WTO' are irrelevant." Einsal, Fagersta, and Rodacciai argue that the Department need not agree with a WTO decision in order to implement that decision. Moreover, Einsal, Fagersta, and Rodacciai contend that the Department "is not implementing a decision of the Appellate Body, but rather certain aspects of the decision of the lower-body WTO panel, which decision the Department chose not to appeal." Einsal, Fagersta, and Rodacciai maintain that the USTR's criticism of the Appellate Body were limited to the Appellate Body's findings related to zeroing outside of the context of

average-to-average comparisons in investigations. Einsal, Fagersta, and Rodacciai further contend that the Department has the "full authority to end zeroing," and that the decision not to "zero" "is within the Department's prerogative."

Department Position:

While the Department, through these section 129 proceedings, is taking actions to bring these investigations into conformity with an adopted WTO panel report, the Department must apply U.S. law. *See* SAA at 1023 (USTR may request that the Department issue a new determination in response to a WTO report only if the action required to render the agency determination not inconsistent with the panel report is in accord with U.S. law). The CAFC, in construing U.S. law, held that the denial of offsets when calculating the weighted-average dumping margin is not required by statute, but is instead a reasonable interpretation of the statute. *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006); *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert. denied sub nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004). While many parties have expressed disagreement with these CAFC decisions, they are binding legal precedent. *See Paul Muller Industrie GmbH v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The "weighted average dumping margin" is defined as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Section 771(35)(B) of the Act. Some parties argue that the use of the word "exceeds" in section 771(35)(A) of the Act demonstrates that only positive dump-

ing margins should be aggregated when calculating the weighted-average dumping margin. This position, however, has been rejected by the CAFC in *Timken*.

In interpreting section 771(35)(A) of the Act, the CAFC examined closely the use of the word "exceeds." Although dictionary definitions cited to the CAFC defined the word "exceeds" in terms of being greater than or going beyond something else, the court found that these dictionary definitions were not so clear so as to compel the denial of offsets. *Timken*, 435 F.3d at 1341. Rather, in a mathematical context, the court held that the word "'exceeds' does not unambiguously preclude the calculation of a negative dumping margin." *Id.*

The Department's calculation of the weighted-average dumping margins in these section 129 proceedings, therefore, is consistent with U.S. law. The Department has aggregated all of the comparison results for a particular exporter or producer, regardless of whether the specific comparisons yielded a positive or negative result. As the CAFC held in *Timken*, the use of the word "exceeds" in section 771(35)(A) of the Act does not require the exclusion of those comparisons that yielded a negative result.

Mittal USA argues that the CAFC in *Corus* and *Timken* did not consider the use of the word "exceeds" as it is found in section 734(b)(2) of the Act. Section 734(b)(2) provides the authority for the Department to enter into a suspension agreement if the exporters who account for substantially all of the imports of the subject merchandise agree to completely eliminate any amount by which normal value exceeds export price or constructed export price. As stated above, such argument does not defeat the fact that *Corus* and *Timken* are binding precedent. *Paul Muller*, 435 F.Supp.2d at 1245. Moreover, section 734 of the Act does not concern the definition of "dumping margin," but rather explains the conditions under which the Department may enter into a

suspension agreement. As such, the Department finds Mittal's argument unpersuasive.

With respect to the argument that interpreting the statute so as to permit the granting of offsets when using average-to-average comparisons in an investigation would nullify the targeted dumping methodology of section 777A(d)(1)(B), this argument makes certain presumptions concerning how the Department would implement the targeted dumping methodology. To date, the Department has not used the targeted dumping methodology, and has not determined how it would apply it. Moreover, the Department's Final Modification was expressly limited to the use of average-to-average comparisons in investigations and was done for the stated purpose of bringing these investigations into conformity with the panel report in *US—Zeroing (EC)*. Consistent with the basis and purpose of its change in methodology, the Department has not foreclosed any methodological options except for the continued use of zeroing with average-to-average comparisons in investigations. Accordingly, the Department will consider, to the extent appropriate, the nullification argument in any future investigation in which it considers whether and how to apply the targeted dumping methodology.

With respect to the argument that the calculation methodology used in these section 129 proceedings is inconsistent with the SAA, the SAA does not specifically state that in aggregating dumping margins to calculate the weighted-average dumping margin the Department would only consider those comparisons with positive results. *See* SAA at 842 (describing average-to-average comparison methodology). Accordingly, the Department disagrees that the SAA precludes the Department from permitting offsets in these Section 129 Determinations.

With respect to the argument that providing offsets would be inconsistent with section 751(a) of the Act as it concerns the assessment of antidumping duties, these section 129 proceed-

ings address only the 12 antidumping investigations that were subject to the WTO panel's report in *US—Zeroing (EC)*. The results of these section 129 proceedings do not address the actual assessment of antidumping duties. As stated above, the Department's Final Modification was expressly limited to the use of average-to-average comparisons in investigations and was done for the stated purpose of bringing these investigations into conformity with the panel report in *US—Zeroing (EC)*. Consistent with the basis and purpose of its change in methodology, the Department has not foreclosed any methodological options except for the continued use of zeroing with average-to-average comparisons in investigations. Accordingly, the Department disagrees that these section 129 proceedings are in any way inconsistent with section 751(a) of the Act.

Comment 2: Targeted Dumping

Multiple domestic interested parties argue that the Department should accept their targeted dumping allegations outside of the "normal" deadline for such allegations in the Department's regulations. These parties note that the Department's regulations at 19 CFR 351.301(d)(5) and 351.414(f)(1) "normally" require that targeted dumping allegations be made 30 days prior to the preliminary determination in an investigation. However, these parties argue that they relied on the Department's original methodology of not offsetting dumped sales by non-dumped sales and believed that this methodology would account for the targeted dumping that was occurring and that is masked by applying offsets. Therefore, these parties contend, the Department should now consider their targeted dumping allegations. Mittal Steel USA, moreover, notes that the European Union has employed a targeted dumping analysis without offsetting dumped sales with non-dumped sales. The following parties have alleged in their case briefs that the listed respondent parties engaged in targeted

dumping by customer, by region, or by regional division, during the original investigations:

1) The steel and pasta petitioners, allegations of targeted dumping by customer, by region, and by regional division:

    Stainless Steel Bar from Italy:
    Foroni
    Rodacciai
    Valbruna

    Stainless Steel Bar from France:
    Ugine-Savoie Imphy, S.A.

    Stainless Steel Bar from the United Kingdom:
    Corus.

    Stainless Steel Bar from Germany:
    Einsal

    Stainless Steel Wire Rod from Sweden:
    Fagersta

2) Nucor Corporation, allegation of targeted dumping by customer and time period; U. S. Steel, allegation of targeted dumping by customer; Mittal Steel, allegation of targeted dumping by customer:

    Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

Numerous respondent parties, including Corus, Valbruna, BGH, Einsal, UGITECH, Rodacciai, and Foroni, argue that the petitioners' allegations regarding targeted dumping are untimely. These parties argue that in its initiation notice of March 1, 2007, the Department clearly defined the scope of these proceedings as limited to solely recalculating the dumping margins using the methodology described in the *Final Modification*. Petitioners' targeted dumping allegations, Corus contends, "fit nowhere within that scope" and, since the petitioners also ask the Department to continue to zero,

are also "contrary to the scope." UGITECH argues, moreover, that "the limited scope of these proceedings is mandated by Section 129, which limits the Department to 'reopen only those matters 'integral' to implementing an adverse WTO decision." UGITECH argues that, if the Department were to accept these allegations, then a reconsideration of the entire investigation would have to follow. Valbruna further argues that the petitioners' request for an extension to file a targeted dumping allegation is also untimely. Corus asks the Department to strike petitioners' allegations concerning targeted dumping from the record.

Corus and Foroni maintain that, contrary to petitioners' assertions, the situation here is no different from that dealt with by the Department in *Activated Carbon from the PRC*, where, they contend, the Department explained that its "change in margin computation methodology is legally distinct from the targeted dumping legal provisions." Moreover, Corus and Foroni argue, the petitioners in *Activated Carbon from the PRC* made the same arguments as the petitioners in this proceeding regarding not being aware that the Department was going to change its methodology. Disputing the petitioners' contention that they believed the Department's original methodology would cover the targeted dumping that was occurring, Rodacciai, Fagersta, and Einsal contend that "petitioners had the data at the time to choose either the regular methodology or the targeted dumping methodology." BGH argues that the purported new margin for Einsal under the petitioners' targeted dumping allegation, which is much larger than Einsal's original investigation rate, "shows either that the petitioners did not consider targeted dumping during the original investigation or that their current calculations are wildly exaggerated."

Regarding the importance of the regulatory deadline for targeted dumping allegations, Corus, Rodacciai, Fagersta and Einsal argue that, in the preamble to the Department's regu-

lations, the Department specifically rejected calls to allow targeted dumping allegations at any time during an anti-dumping investigation prior to the filing of the case briefs. Thus, Corus contends, "by adopting a deadline that purposefully antedates the preliminary determination, the Department implicitly rejected the notion that the choice in margin computation methodology determines whether a targeted dumping allegation should be made." Rodaccia, Fagersta, and Einsal note, moreover, that the Department explained, in the preamble to its regulations, that allowing targeted dumping allegations after 30 days prior to the preliminary determination "would make any verification of issues relative to the allegation extremely difficult."

Foroni and Corus contend that the targeted dumping provision addresses both the practice of charging lower prices in one subset of the U.S. market than in the home market and the practice of charging lower prices in that U.S. market subset as compared to other parts of the United States, which, they argue, the petitioners have failed to do. Corus further contends that, if the Department were to find targeted dumping in this case regarding time period, then the ITC would also need to reconsider its analysis regarding injury. Corus affirms that the Department's only guidance on targeted dumping comes from the *Redetermination on Remand Final Determination of Sales at Less than Fair Value of Certain Pasty from Italy* (Department of Commerce Aug. 28, 1998) (Pasta Remand). According to Corus, if the evidentiary requirements and testing procedures developed in the Pasta Remand are applied in this case, then none of the allegations made by petitioners "can withstand scrutiny." Corus contends that the petitioners have instead employed differing methodologies that do not capture factors of any form of targeting. Moreover, Corus avers that the Department cannot extend a targeted dumping analysis to all of its sales, as U. S. Steel and Mittal argue.

Valbruna, BGH, Einsal, Fagersta, UGITECH, Rodacciai, and Foroni all argue that the petitioners' respective arguments regarding targeted dumping in their cases are insufficient. UGITECH, Valbruna, and Foroni argue that the petitioners' allegations rely on dumping margins, rather than prices, as required by the Department's regulations. Valbruna further argues that petitioners' approach would have the Department find targeted dumping wherever there is evidence of any positive margin. Rodacciai, Fagersta, and Einsal contend, moreover, that "petitioners have not supplied the Department with a standard and appropriate statistical analysis of U. S. prices," nor with a basis for their allegations.

Foroni and Valbruna contend that the petitioners' allegations are distortive. Foroni asks whether it can "possibly be targeting when the purported sweep is so broad." Several parties, moreover, point to what they consider inaccuracies in the petitioners' targeted dumping calculations. Foroni argues that price differences in time periods were nothing more than a reflection of a general trend of increasing prices in the market. Lastly, UGITECH asserts that "even if the Department were to accept Petitioners' claims of targeted dumping, the weighted average dumping margin using the method specified in the regulations for average-to-average for non-targeted dumping sales and the targeted dumping methodology for the remainder would still produce a negative dumping margin."

Department Position:

First, the Department has not stricken domestic interested parties' allegations from the record. We invited interested parties to comment on all issues they believed continued to be relevant in this proceeding, which domestic interested parties have done in making these allegations. We note, however, that, for the reasons described below, we are not considering these allegations in these proceedings.

The Department's regulations provide, "The Secretary normally will examine *only targeted dumping described in an allegation, filed within the time indicated in § 351.301(d)(5).*" 19 CFR 351.414(f)(3) (emphasis added). That deadline is "no later than 30 days before the scheduled date of the preliminary determination." 19 CFR 351.301(d)(5).

In the preamble to the Department's regulations, the Department declined to adopt suggestions to extend or eliminate this deadline. *Antidumping Duties; Countervailing Duties*, 62 FR 27295, 27338 (May 19, 1997) (final rule). The Department reasoned that the regulation gave domestic interested parties sufficient time to analyze the relevant data, and allow the Department to consider the allegation before issuing the preliminary determination. *Id.* at 27338, 27375. The Department stated that a later deadline would make verification issues extremely difficult. *Id.* at 27375. The Department noted that it intended to be flexible with the deadline where appropriate, such as where the timing of the filing of the responses did not permit an adequate analysis. *Id.* at 27338, 27375.

In all of the investigations subject to these section 129 proceedings, there was ample time during the original investigations for domestic interested parties to analyze the responses and make targeted dumping allegations. At this late stage, the Department does not have sufficient time to make a preliminary finding regarding targeted dumping, and allow time for comment. Additionally, the Department is unable at this time to conduct verification regarding the targeted dumping allegations. Accordingly, the Department does not find that there is "good cause" to extend the deadline in 19 CFR 351.301(d)(5) and consider the targeted dumping allegations made in these section 129 proceedings.

With respect to the argument that in the original investigations the domestic interested parties relied on the Department's denial of offsets to account for any targeted dumping that may have been masked by applying offsets, the Depart-

ment notes that the targeted dumping methodology, section 777A(d)(1)(B) of the Act, is an independent provision of the antidumping law, unrelated to the Department's modification of its methodology of calculating weighted-average dumping margins in these investigations. Thus, if the domestic interested parties believed that targeted dumping was occurring, they had the opportunity to make their targeted dumping allegations in a timely manner.

Comment 3: Treatment of Unliquidated Entries

Fagersta, respondent in the investigation of Stainless Steel Wire Rod from Sweden, argues that the Department has the authority to apply the revocation of the antidumping duty order to all unliquidated entries. Fagersta notes that, when an antidumping investigation is negative, section 735(c)(2) of the Act requires the Department to "terminate the suspension of liquidation" and to "release any bond or other security." Fagersta contends that in its case, this means that the Department must release all cash deposits from the 2004-05 and 2005-06 administrative reviews and liquidate these entries without regard to antidumping duties. Fagersta notes that the Court of International Trade (CIT) in *Sonco Steel Tube Div. v. United States*, 698 F. Supp. 927, 928 (CIT 1988) ruled that "valid orders must underlie continuing proceedings," and that the CAFC agreed stating in *Asociacion Colombiana de Exportadores v. United States*, 916 F.2d 1571, 1577 (Fed. Cir. 1990) that "without a valid antidumping determination in the original order, there can be no valid determination in a later annual review." Fagersta also points to the CIT's recent decision in *Tembec, Inc. v. United States*, 461 F. Supp. 2d 1355, 1366-67 (CIT 2006) (*Tembec*). Fagersta argues that in that case, the CIT affirmed that the important issue is the "simple fact that there is no longer an antidumping duty order for which to conduct administrative reviews."

Fagersta argues that consistent with the CAFC's holding in *Parkdale Int'l. v. United States*, due to the retrospective nature of the antidumping law, the "prospective" nature of section 129 determinations would apply to all entries that are unliquidated as of the date of implementation of the section 129 determination. Moreover, Fagersta argues that the Department has successfully argued before the WTO that neither the statute nor the SAA preclude the Department from applying a revocation to unliquidated entries made prior to the implementation of a section 129 determination. Fagersta further contends that the Department has the authority to do exactly this, and should exercise this authority. Moreover, Fagersta notes that if the Department were not to exercise its authority, it could be susceptible to a WTO DSU Article 21.5 compliance proceeding. In the alternative, Fagersta requests a changed circumstances review to determine whether to revoke the antidumping duty *ab initio*, terminate any pending administrative reviews, and liquidate any unliquidated entries made by Fagersta without regard to antidumping duties.

Corus, a respondent in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, Valbruna, a respondent in the investigation of Stainless Steel Bar from Italy, and UGITECH, a respondent in the investigation of Stainless Steel Bar from France, also argue that the Department must liquidate, without regard to antidumping duties, any entries of subject merchandise produced by Corus that are currently suspended. Foroni supports this position in its rebuttal brief. Given the April 9, 2007, deadline for the Department to fully implement, Corus argues, the Department must address the issue of unliquidated entries "forthwith." Corus and Valbruna assert that liquidating suspended entries without regard to antidumping duties is "prospective" in relation to the date of implementation. Therefore, Corus avers, "the Department must consider the revocation of the Dutch Steel AD Order when taking any future actions." Valbruna affirms that "the unliquidated entries of Valbruna's

merchandise should not be subject to final assessment of antidumping duties." Corus and Valbruna also suggest that their position is supported by the Department's implementation of an adverse WTO compliance report with regard to the countervailing duty investigation and first administrative review of Softwood Lumber from Canada. See Additional Memorandum from the United States, *United States-Final CVD Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, (October 5, 2005)Like Fagersta, Corus also argues that the Department has successfully argued before a WTO dispute settlement panel that neither the statute nor the SAA preclude it from applying revocation to entries made prior to the implementation of a section 129 determination. Lastly, Corus argues that, were the Department not to terminate any segment of the proceeding based on revocation, that the Department must then recalculate margins by offsetting dumped sales with non-dumped sales.

The European Commission (Commission) makes similar arguments concerning liquidation of entries for exporters whose rates are now calculated to be zero or *de minimis*. Namely, the Commission argues that the Department should liquidate all suspended entries for such exporters without regard to antidumping duties. For cases in which the investigation rate was superseded by an administrative review, the Commission argues that the Department should recalculate the most recent review rate without offsetting dumped sales with non-dumped sales. Also, the Commission argues that the magnitude of dumping considered in any sunset reviews should be calculated without zeroing.

REBUTTAL BRIEFS

The steel and pasta petitioners, Nucor, Mittal USA, and U.S. Steel all argue that the statute, the SAA, and the Department's practice do not permit the Department to apply section 129 determinations to entries made prior to the USTR's imple-

mentation direction. Therefore, these parties contend, the Department may not apply its determination to any unliquidated entries made prior to the implementation date instructed by USTR, nor to any post-investigation administrative reviews. Nor can the Department, these parties contend, calculate any administrative review margins by offsetting dumped sales with non-dumped sales.

Mittal USA affirms that it is the original investigation of Certain-Hot Rolled Carbon Steel Flat Products from the Netherlands that was challenged at the WTO and that it is this investigation specifically that is the subject of this proceeding. Mittal USA argues that assessment rates and current cash deposit rates were determined in administrative reviews. The steel and pasta petitioners argue that Fagersta's reliance on *Tembec* is misplaced because the decision "has been vacated and has no precedential effect."

Nucor argues that Corus' argument is rebutted by the statutory provision establishing the timeline for section 129 determinations by the ITC. Namely, Nucor argues, "the statutory timeline, and the prospective nature of relief, are the same for the ITC's section 129 proceedings, although the statute explicitly states that such proceedings will result in revocation." Nucor and U.S. Steel also argue that Corus' implication that the Department applied the results of its redetermination in Canadian Softwood Lumber are misplaced because in that case, as Nucor argues, "the Department specifically limited actual application of the new margins resulting from the methodology to entries made on or after the Trade Representative's direction." Nucor and U.S. Steel point to other section 129 determinations where the Department specifically limited implementation of its determinations to commence on the date that USTR instructed the Department to do so. Moreover, U.S. Steel notes that the Department has very recently argued for applying its section 129 determinations prospectively before the CAFC, specif-

ically in its response brief submitted to the CAFC on March 6, 2007, in Corus' appeal of the second administrative review.

Department Position:

The Department disagrees that any revocations that result from these section 129 proceedings apply to any entries made prior to the implementation date. Rather, section 129 itself, and the SAA, specifically provide for which entries will be affected by a revocation resulting from a section 129 proceeding.

Section 129(c)(1) of the URAA provides that any determinations made by the Department pursuant to section 129 "shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination."

The SAA confirms the meaning of this language in a situation in which a section 129 proceeding results in the revocation of an order. Specifically, the SAA states, "Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of the Trade Representative's direction would remain subject to potential duty liability." SAA at 1026. Accordingly, pursuant to the statute and the SAA, any revocations resulting from these section 129 proceedings will not apply to entries made before the date of USTR's direction.

The Department disagrees with Fagersta that if the Department revokes an order as a result of these section 129 proceedings, the original determination of sales at less than fair value was invalid, and thus the Department must release all cash deposits currently held and order liquidation without regard to antidumping duties. The original determinations of

sales at less than fair value were made under U.S. law. None of the 12 investigations subject to these section 129 proceedings was found to be invalid under U.S. law. These section 129 proceedings are meant to render the Department's determinations not inconsistent with the panel's findings in *US—Zeroing (EC)*. That panel did not apply U.S. law, but rather considered whether the Department's determinations were inconsistent with the AD Agreement. As such, for each of the section 129 proceedings that result in a revocation of the antidumping order, a determination of sales at less than fair value, valid under U.S. law, remains in place up until the date on which USTR directs the Department to implement the new determinations. Consistent with section 129(c)(1) and the SAA, all entries made prior to this date remain subject to potential liability for antidumping duties.

Apart from confirming that the effect of these section 129 determinations will be prospective only, meaning that they will apply with respect to unliquidated entries made on or after the date on which USTR directs the Department to implement these determinations, the Department is taking no further position in these determinations. Because the treatment of any unliquidated entries made prior to the effective date of these determinations will not be governed by these determinations, such entries will be addressed through separate segments of these proceedings, as appropriate.

Issue 4: Calculation of All-Others Rate

In the Preliminary Results, the Department recalculated the all-others rates based on the recalculated dumping margins for the original respondents. In three investigations, Stainless Steel Bar from France, Stainless Steel from Italy, and Stainless Steel Bar from the United Kingdom, there were no margins remaining that were not based on adverse facts available (AFA) that were above *de minimis*. Therefore, pursuant to Department practice, the Department based the all-others rate on a simple average of the zero/*de minimis* margins

and the AFA margins. The following parties contested this methodology:

1) UGITECH, in the investigation of Stainless Steel Bar from Italy

2) Sandvik Limited, in the investigation of Stainless Steel Bar from the United Kingdom

3) The Commission, in the investigations of Stainless Steel Bar from France, Stainless Steel Bar from Italy, and Stainless Steel Bar from the United Kingdom

4) The Government of the United Kingdom, in the investigation of Stainless Steel Bar from the United Kingdom

5) The Government of France, in the investigation of Stainless Steel Bar from France

All of the above parties take issue with the Department's recalculation of the all-others rate as a simple average of zero or *de minimis* margins and AFA margins. These parties note that 19 U.S.C. 1673d(c)(5)(B) grants the Department the discretion to use a reasonable method to determine the all-others rate in such situations and that the SAA offers a preferred methodology in weight-averaging the zero and *de minimis* margins and margins based on AFA. However, these parties also note that the SAA states that, "if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." These parties assert that, in each of the three investigations noted above, the simple averaging methodology is inappropriate because the margins generated by it are not reasonable and not reflective of the potential antidumping margins for non-investigated exporters.

Moreover, the Government of France argues that this methodology is in violation of Article 6.8 and Annex II of the AD

Agreement; the Commission and the Government of the United Kingdom argue that the methodology is "inconsistent with the United States' international obligations," particularly because the Appellate Body has held, in cases where sampling is employed, that Article 9.4 of the AD Agreement prohibits the inclusion of AFA rates in the calculation of the all-others rate. UGITECH argues that the calculation is flawed because the SAA favors a weight average first before a simple average is employed, and because it asserts that the Department erred in setting the below-zero margins of several of the respondents in its all-others rate recalculation to zero. Instead, UGITECH contends that the Department should average the actual negative margins of the respondents, and should not set these margins to zero.

As alternative methodologies, the Government of France argues that the Department should use the original all-others rate of 3.9 percent in the investigation of Stainless Steel Bar from France. The Commission proposes that the all-others rate remain what they were in the original investigations. Sandvik Limited contends that a more reasonable rate would be the current rate of 4.48 percent in the investigation of Stainless Steel Bar from the United Kingdom, a weight-average of Corus' new zero margin shipments and Firth Rixons's 125.77 percent margin shipments during the 2005-06 administrative review; or, leave the 4.48 percent rate in effect until a new Enpar/Firth Rixson rate is determined which could become the new all-others rate at the completion of the pending review. Lastly, UGITECH avers that the Department should not set the respondents' below zero-margins to zero when averaging and should employ a weight average in its calculation of the all-others rate.

REBUTTAL BRIEFS

In their rebuttal briefs, the steel and pasta petitioners argue that the Department's methodology was reasonable and that a respondent may request an administrative review if it believes

the new all-others rate is not reflective of its own rate of dumping. The steel and pasta petitioners point to *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) (*PET Resin from Indonesia*), *Notice of Final Determination of Sales at Less Than Fair Value: Polyethlene Retail Carrier Bags from Malaysia*, 69 FR 34128 (June 18, 2004) (*Bags from Malaysia*), and *Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 4703 (January 31, 2002) as examples in which the Department employed this methodology to generate an all-others rate.

Department Position:

Where the weighted-average dumping margins for all of the individually investigated respondents are zero or *de minimis* or are based on AFA, the Department's practice is to calculate the all other's rate based on a simple average of the zero or *de minimis* margins and the margins based on AFA. *See PET Resin from Indonesia* and *Bags from Malaysia*. The Department finds that it is appropriate to continue to follow its practice in these section 129 proceedings.

This practice is based on the SAA, which states:

> The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

SAA at 873.

Regarding UGITECH's argument that the SAA first prescribes that the Department calculate a weighted average, rather than a simple average, of the zero or *de minimis* margins and the margins based on AFA, the Department notes that this is simply not feasible in situations where a margin is based on AFA. In such a situation, the quantity and value information for companies whose margins are based on AFA is not reliable.

The Department further finds unavailing arguments from various parties that the all-others rate should remain unchanged from the original investigation. The very reason for these section 129 proceedings is that the Panel found those margins to be flawed due to the Department's treatment of the non-dumped sales. The Department finds it inappropriate to continue to base the all-other's rate on the very margins that the Department has had to recalculate through these section 129 proceedings.

The Department likewise declines to adopt Sandvik Limited's suggestion to base the calculation of the all-others rate in the investigation of Stainless Steel Bar from the United Kingdom on Corus' new rate, and Enpar/Firth Rixson's rate from the 2005-06 administrative review. First, these two rates come from different time periods. Second, information regarding Enpar/Firth Rixson's 2005-06 administrative review is not on the record of this section 129 proceeding.

Moreover, the Department disagrees with UGITECH that, in calculating the all-others rate, it should use the negative values for those exporters or producers whose weighted-average dumping margin were below zero. Section 735(c)(5)(A) of the Act specifically instructs the Department to exclude "any zero and *de minimis* margins" when calculating the all-others rate. Moreover, both section 735(c)(5)(B) of the Act and the SAA expressly refer to averaging zero, *de minimis* and FA rates. The statute makes no mention of negative weighted-average dumping margins.

Thus, where no weighted-average dumping margins exist other than those which are zero, *de minimis* or based on facts available, the Department is not required to treat negative weighted-average dumping margins as other than zero in calculating the all-others rate. Further, the methodology used is similar to that described in the statute and the SAA.

The Department notes that the new all-others rates will be applied initially as cash deposit rates. The new all-other's rates will not necessarily serve as the assessment rates, if the companies subject to those rates request administrative reviews. Rather, the Department will establish the assessment rates and calculate new, company-specific cash deposit rates through such administrative reviews.

Comment 5: Clerical Error Allegation in the Investigation of Stainless Steel Sheet and Strip in Coils from Italy

TKAST alleges that, in the original margin calculation, the Department incorrectly calculated the U. S. price for certain unreported sales through TKAST's affiliate Ken-Mac. In the original investigation, the Department applied an AFA rate to AST for failing to report 84 U.S. sales made through its affiliate Ken-Mac. The Department allegedly verified the quantity and value of these 84 unreported sales.

For the AFA calculation, the Department applied the highest non-aberrational rate calculated for TKAST's other properly reported U.S. sales (29.83%), to the average unit value (AUV) of TKAST's 84 unreported Ken-Mac sales for a hybrid calculation of the potential uncollected dumping duties (PUDD). TKAST argues that the Department miscalculated the AUV of these unreported sales by inadvertently dividing quantity by value, instead of correctly dividing the value by the quantity. This miscalculation, TKAST alleges, resulted in an overstatement of the total PUDD and ultimately of the final margin. TKAST did not raise this issue as a cler-

ical error or in the litigation subsequent to the original investigation.

Additionally, TKAST argues that the calculation of the highest non-aberrational rate (which is applied to the AUV of the unreported 84 sales and also to the AUV of a group of affiliated downstream sales which could not be verified), should be modified to take into account the Department's new methodology of not zeroing. TKAST maintains that without zeroing, the new highest non-aberrational margin is 14.08%.

Finally, TKAST argues that the Department, pursuant to a remand from the CIT (which was dropped by TKAST prior to the issuance of a final order), recalculated the AUV for its affiliated downstream sales that took into account verified selling expenses and that netted these expenses from the U.S. price. TKAST argues that these expenses should also be deducted from the 84 unreported sales when generating a net price.

In rebuttal, domestic interested parties Allegheny Ludlum and AK Steel Corporation maintain that the Department's new zeroing methodology is not related to the issue of a clerical error that may or may not have existed at the time of the original investigation. Allegheny Ludlum and AK Steel Corporation argue that TKAST does not argue that it was somehow precluded from raising this alleged clerical error during the original investigation. Allegheny Ludlum and AK Steel Corporation argue that the time has passed for the introduction of clerical errors. Allegheny Ludlum and AK Steel Corporation contend that TKAST could have asked for judicial review of this issue at the time of the original investigation and thus should be barred from raising it at this time. If the Department, however, decides to consider this issue, Allegheny Ludlum and AK Steel Corporation contend, the entire record should be opened to allow a comprehensive analysis of TKAST's data, including specifically whether

TKAST engaged in targeted dumping. If the Department considers this issue, Allegheny Ludlum and AK Steel Corporation contend, it should re-open the entire record, delay the final determination and provide all parties with a full and fair opportunity to address all issues related to the calculation of TKAST's dumping margin.

Department Position:

We find that there is a reasonable basis to investigate these allegations further. The Department's goal is to ensure that its recalculations accurately reflect its methodological choices. The Department is not reconsidering any of those methodological choices other than to apply the Final Modification. To ensure all parties have access to the information needed to analyze this issue, we are postponing our decision with respect to stainless steel sheet and strip in coils from Italy and placing further information on the record. We will announce a further schedule for comments once this additional information is placed on the record.

Comment 6: Clarification of Valbruna Exporter Name

Valbruna argues that the Department should use the name Acciaierie Valbruna S.p..A. and not Acciaierie Valbruna S.r.l. in its final results of this proceeding and in any liquidation instructions sent to U.S. Customs and Border Protection. Valbruna argues that the Department has previously recognized that Valbruna's name was changed from Acciaierie Valbruna S.r.l. to Acciaierie Valbruna S.p.A.

Department Position:

We agree with Valbruna that the customs instructions should reflect the name Acciaierie Valbruna S.p.A. In the investigation, the *Federal Register* notices all reflect the old name. However, all the customs instructions reflect the new name for cash deposit purposes. Also, letters sent to Valbruna's counsel during the investigation were addressed using the

new name. The Department performed a changed circumstances review for Valbruna in the stainless steel wire rod from Italy case and found that Acciaierie Valbruna S.p.A. was the successor-in-interest to Acciaierie Valbruna S.r.l. *See Stainless Steel Wire Rod from Italy: Notice of Final Results of Changed Circumstances Antidumping Duty Review*, 71 FR 24643 (April 26, 2006).

Comment 7: The Department's Briefing Schedule

IPSCO, Steel Dynamics and Gallatin argue that the "Department's limited briefing schedule chills U.S. producers' due process rights." IPSCO, Steel Dynamics and Gallatin note that the Department issued its preliminary determinations in these proceedings only four days after issuing its initiation notice. Moreover, IPSCO, Steel Dynamics and Gallatin note, parties were only afforded 15 days to submit comments on the preliminary determinations. This short time period, IPSCO, Steel Dynamics and Gallatin assert, especially given the magnitude of the Department's change in methodology, "gives the appearance that the Department is attempting to sweep its highly questionable new offset practice under the rug without a full hearing of the issues."

Department Position:

The Department's change in methodology has been the result of a long, deliberative process that did not begin with the initiation notice of these 129 proceedings. Instead, this process dates to March 6, 2006, when the Department published a notice in the *Federal Register* proposing that it would no longer make average-to-average comparisons without providing offsets for non-dumped comparisons. *See* 71 FR 11189. In that notice, the Department solicited comments on its proposed change in methodology. The Department received numerous comments, which it carefully considered prior to publishing the Final Modification notice on December 27, 2006.

As the Department stated when it initiated these section 129 proceedings, its sole intention was to recalculate the dumping margins using the methodology described in the Final Modification. *Implementation of the Findings of the WTO Panel in US Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures*, 72 FR 9306 (March 1, 2007). The Department, therefore, has given the parties to these proceedings sufficient time to comment on the application of the Final Modification to the investigations subject to these section 129 proceedings.

FINAL ANTIDUMPING MARGINS

The recalculated margins, unchanged from the Preliminary Results for all cases, except the investigation of Stainless Steel Sheet and Strip in Coils from Italy, are as follows:

1) Certain Hot-Rolled Carbon Steel from the Netherlands

   - The margin for Corus, the sole respondent, decreases from 2.59 percent to zero. Since Corus was the only respondent in the investigation, this order will be revoked.

2) Stainless Steel Bar from France

   - The margin for UGITECH decreases from 3.9 percent to zero. This order will be revoked for UGITECH.
   - The margin for Aubert and Duval S.A. was based on total AFA. This margin does not change as a result of this proceeding.
   - Since there are no non-AFA, above *de minimis* margins remaining, pursuant to Department practice, the all others rate is based on a simple average of the zero margins and the AFA margins.

Therefore, the all-others rate changes from 3.9 percent to 35.92 percent.

3) Stainless Steel Bar from Germany

- The margin for BGH decreases from 13.63 percent to 2.59 percent.
- The margin for Einsal decreases from 4.17 percent to *de minimis*. The order will be revoked for Einsal.
- The margin for Edelstahl Witten-Krefeld GmbH decreases from 15.40 percent to 10.82 percent.
- The margin for Krupp Edelstahlprofile GmbH decreases from 32.32 percent to 31.25 percent.
- The all-others rate changes from 16.96 percent to 15.16 percent.

4) Stainless Steel Bar from Italy

- The margin for Acciaiera Valbruna S.p.A. decreases from 2.50 percent to zero. This order will be revoked for Acciaiera Valbruna S.p.A.
- The margin for Acciaiera Foroni S.p.A. decreases from 7.07 percent to zero. The order will be revoked for Acciaiera Foroni S.p.A.
- Trafilerie Bedini S.r.l. was excluded from the order and that does not change as a result of this proceeding.
- The margin for Cogne Acciai Speciali Srl was based on total AFA. This margin does not change as a result of this proceeding.
- The margin for Rodacciai S.p.A. decreases from 3.83 percent to zero. The order will be revoked for Rodacciai S.p.A.
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins.

Therefore, the all-others rate changes from 3.81 percent to 6.60 percent.

5) Stainless Steel Bar from the United Kingdom

- The margin for Corus Engineering Steels Ltd. Decreases from 4.48 percent to zero. The order will be revoked for Corus Engineering Steels Ltd.
- Firth Rixon Special Steels Ltd. and Crownridge Stainless Steel Ltd.'s s/Valkia Ltd.'s margins were based on total AFA. These margins do not change as a result of this proceeding.
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 4.48 percent to 83.85 percent.

6) Stainless Steel Wire Rod from Sweden

- The margin for Fagersta Stainless AB decreases from 5.71 percent to zero. Since Fagersta Stainless AB was the only respondent in the investigation, this order will be revoked.

7) Stainless Steel Wire Rod from Spain

- The margin for Roldan S.A., the sole respondent, decreases from 4.76 percent to 2.71 percent.
- The all-others rate changes from 4.76 percent to 2.71 percent.

8) Stainless Steel Wire Rod from Italy

- The margin for Cogne Acciai Speciali S.r.l. decreases from 12.73 percent to 11.25 percent.
- Acciaiera Valbruna S.p.A. was excluded from the order and that does not change as a result of this proceeding.

- The all-others rate changes from 12.73 percent to 11.25 percent.

9) Stainless Steel Plate in Coils from Belgium

- The margin for Ugine & ALZ Belgium (formerly ALZ N.V.), the sole respondent, decreases from 9.84 percent to 8.54 percent.
- The all-others rate changes from 9.84 percent to 8.54 percent.

10) Certain Cut-To-Length Carbon-Quality Steel Plate Products from Italy

- The margin for Palini and Bertoli S.p.A. decreases from 7.85 percent to 7.64 percent.
- ILVA S.p.A. was excluded from the order and that does not change as a result of this proceeding.
- The all-others rate changes from 7.85 percent to 7.64 percent.

11) Certain Pasta from Italy

- The margin for Arrighi S.p.A. Industrie Alimentari decreases from 21.34 percent to 20.84 percent.
- The margin for Liguori Pastificio Dal 1820 S.p.A. decreases from 12.41 percent to 12.14 percent.
- The margin for Pastificio Fratelli Pagani S.p.A. decreases from 18.30 percent to 18.23 percent.
- The margin for La Molisana Industrie Alimentari S.p.A. remains at 14.78 percent based on this recalculation.
- De Matteis Agroalimentare S.p.A. and Delverde S.r.l. were excluded from the order and that does not change as a result of this proceeding.
- F.lli De Cecco de Filippo Fara San Martino S.p.A.'s margin was based on total AFA. This margin does not change as a result of this proceeding.

- The all-others rate changes from 12.09 percent to 16.51 percent. We note that Delverde S.r.l.'s margin in the investigation was a component of the all-others rate. However, since Delverde S.r.l. was later revoked from the order as a result of litigation relating to the investigation, its margin is no longer a component of the all-others rate. We note also that, for cash deposit purposes, we deduct from the margin of dumping any export subsidies. On that basis, the new cash deposit rate that will be established for all-others is 15.45 percent.

Additional Comments from the EC

The EC also argued that the United States needs to undertake section 129 proceedings with respect to the challenged administrative reviews and made certain suggestions about how such proceedings should occur. Such comments are beyond the scope of the present section 129 proceedings and the Department will not otherwise address them in these proceedings.

RECOMMENDATION

In light of the Panel's report, we recommend implementing the recommendations and rulings of the DSB by applying the methodology in the Final Modification, and adopting the above recalculations.

Agree _____ Disagree _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date

APPENDIX C

FEDERAL REGISTER

Vol. 72, No. 098

Notices

DEPARTMENT OF COMMERCE (DOC)

International Trade Administration (ITA)

Import Administration

[A-421-807]

Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review

---

72 FR 28676

DATE: Tuesday, May 22, 2007

SUMMARY: On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 71523 (December 11, 2006) (*Preliminary Results*). This review covers imports of subject merchandise from Corus Staal BV (Corus Staal) to the United States during the period November 1, 2004, to October 31, 2005. Based on our analysis of the comments received, we have made changes to the margin calculation. However, the final results do not differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of Review."

EFFECTIVE DATE: May 22, 2007.

FOR FURTHER INFORMATION CONTACT: David Cordell or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482-0409 or (202) 482-0649, respectively.

SUPPLEMENTARY INFORMATION: On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. *See Preliminary Results.* In response to the Department's invitation to comment on the preliminary results of this review, Corus (respondent) and domestic interested party Mittal Steel USA Inc. (Mittal Steel) filed case briefs on January 17, 2007. Corus, Mittal Steel and petitioner United States Steel Corporation (U.S. Steel) submitted rebuttal briefs on January 24, 2007, and on January 25, 2007, domestic interested party Nucor Corporation (Nucor) filed a rebuttal brief. On March 23, 2007, the Department extended the final results by 35 days. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Antidumping Duty Administrative Review; Extension of Time Limit*, 72 FR 13744 (March 23, 2007).

On May 4, 2007, Corus submitted a request for the Department to rescind the review in light of the Department's *Final Results for the Section 129 Determination: Certain Hot-rolled Carbon Steel from the Netherlands* (April 9, 2007) and the U.S. Trade Representative's instructions to the Department to implement those findings under Section 129 of the Uruguay Round Agreements Act. *See Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations under Section 129 of the Uruguay Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 25, 261 (May 4, 2007). On May 11, 2007, Mittal Steel and Nucor submitted responses to Corus Staal's request. The request for rescission is well past the deadline for such requests and furthermore Corus Staal itself did not request

the review, thus making it ineligible to request rescission. *See* 19 CFR 351.213(d)(1). Corus' arguments regarding the section 129 determination are addressed in the Issues and Decisions Memorandum, (Decision Memorandum) which accompanies this Notice, at issue 4.

Period of Review

The period of review (POR) is November 1, 2004, to October 31, 2005.

Scope of the Order

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate *(i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of the order. Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels

contains micro-alloying levels of elements such silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or

2.25 percent of silicon, or

1.00 percent of copper, or

0.50 percent of aluminum, or

1.25 percent of chromium, or

0.30 percent of cobalt, or

0.40 percent of lead, or

1.25 percent of nickel, or

0.30 percent of tungsten, or

0.10 percent of molybdenum, or

0.10 percent of niobium, or

0.15 percent of vanadium, or

0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above

(including, *e.g.*, ASTM specifications A543, A387, A514, A517, A506).

- Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTS.
- Tool steels, as defined in the HTS.
- Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by this order, including: vacuum degassed fully stabilized; high

strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Decision Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for AD/CVD Operations, to David M. Spooner, Assistant Secretary for Import Administration, dated May 15, 2007, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly via the Internet at *www.ia.ita.doc.gov*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Duty Absorption

In the *Preliminary Results*, the Department found that Corus Staal absorbed antidumping duties on all U.S. sales in accordance with section 751(a)(4) of the Tariff Act of 1930, as amended (the Tariff Act). Corus Staal has failed to provide

evidence that the unaffiliated customers in the United States will pay the full duty ultimately assessed on the subject merchandise. *See* Comment 6 of the Issues and Decisions Memorandum. Thus, for the final results of this review, we continue to find that Corus Staal absorbed antidumping duties.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

- We corrected a clerical error that erroneously compared U.S. control numbers to comparison market product codes.
- We corrected a clerical error involving the CEP profit rate.

These changes are discussed in the relevant sections of the Decision Memorandum.

Final Results of Review

We determine that the following weighted-average percentage margin exists for the period November 1, 2004, to October 31, 2005:

Manufacturer/Exporter	Weighted Average Margin (percentage)
Corus Staal BV	2.52

Assessment

The Department shall determine, and the CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer-specific assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. The Department will issue appropriate *ad valorem* assessment instruc-

tions directly to CBP 15 days after publication of these final results of review. We will direct CBP to assess the resulting assessment rate against the entered customs values for the subject merchandise on each of the importer's entries during the POR.

Cash Deposit Requirements

On May 4, 2007, the Department published a FR notice that, *inter alia,* revoked this order, effective April 23, 2007. *See Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice ofDeterminations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 25,261 (May 4,2007). Therefore, there is no need to issue new cash deposit instructions for this administrative review.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 C.F.R. § 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 C.F.R. § 351.305, that continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 15, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

1. Simplified Reporting and Further-Manufactured Imports
2. G&A expenses
3. Constructed Export Price (CEP) Profit Rate
4. Offsetting Dumped Sales with Non-Dumped Sales
5. Classification of JIT Deliveries as CEP Sales
6. Duty Absorption
7. Warranty Expenses
8. Clerical Errors

APPENDIX D

* * * FOR YOUR CONVENIENCE LEXIS HAS INCLUDED THE UNPUBLISHED DECISION MEMORANDUM HERE * * *

A-421-807
POR: 11/01/2004-10/31/2005
AD/CVD Operations, O7: DC, DS
Public Document

MEMORANDUM: David M. Spooner Assistant Secretary for Import Administration

FROM: Stephen Claeys Deputy Assistant Secretary for AD/CVD Operations

SUBJECT: Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2004-2005 administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products (hot-rolled steel) from the Netherlands. As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Simplified Reporting and Further-Manufactured Imports
2. G&A expenses

3. Constructed Export Price (CEP) Profit Rate

4. Offsetting Dumped Sales with Non-Dumped Sales

5. Classification of JIT Deliveries as CEP Sales

6. Duty Absorption

7. Warranty Expenses

8. Clerical Errors

Background

On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review, 71 FR 71523 (December 11, 2006) (Preliminary Results). The period of review (POR) is November 1, 2004, through October 31, 2005.

This review covers sales of certain hot-rolled steel made by one manufacturer/exporter, Corus Staal BV (Corus). We invited parties to comment on our preliminary results. We received case briefs from Corus and domestic interested party Mittal Steel USA Inc. (Mittal Steel) on January 17, 2007. On January 24, 2004, we received rebuttal briefs from Corus, Mittal Steel and petitioner United States Steel Corporation (U.S. Steel). On January 25, 2007, domestic interested party Nucor Corporation (Nucor) filed a rebuttal brief.

Discussion of the Issues

1. Simplified Reporting and Further-Manufactured Imports

Mittal Steel renews its objections to the Department's use of "simplified reporting" for Corus' imports that were further manufactured by affiliates. According to Mittal Steel, once the Department has determined the value added in the United States to imports of subject merchandise is likely to exceed substantially the value of those imports, the Department's

subsequent decision to use identical or similar subject merchandise to calculate a margin for the further-manufactured imports is dependent upon two factors. Mittal Steel states those two factors are (1) whether there is a sufficient quantity of sales to provide a reasonable basis for comparison and (2) whether it is appropriate to use such sales, citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews (TRBs from Japan), 63 FR 2558, 2561. Further citing TRBs from Japan, Mittal Steel claims the Department also must examine whether the use of any proxy produces accurate results.

Mittal Steel states that prior to the preliminary results of this review, it urged the Department to collect additional data on Corus' further-manufactured U.S. imports and to base the dumping margin on those data. Mittal Steel asserts the preliminary results confirm the need for the Department to obtain additional data, and that the Department is legally required to do so in order to calculate the most accurate margin possible.

Mittal Steel states it used information on the record to create a U.S. sales database of further-manufactured products and then used this database to estimate a margin for Corus' further-manufactured imports. Specifically, Mittal Steel contends that it used the information regarding Corus' further-manufactured imports in Exhibit A-30 of Corus' April 28, 2006, supplemental questionnaire response (SQR) to determine the product code, physical characteristics, quantity, gross unit price, and entered value of the further-manufactured imports. See Mittal Steel Case Brief at 4. Mittal Steel also describes how it used other information on the record to derive an amount for certain adjustments to U.S. price and to set the values for other fields. *Id.* at 4-5. To determine the

cost of further manufacturing, Mittal Steel states it subtracted the cost of the imported inputs from the sales price of the finished products in Exhibit A-30 of Corus' April 28, 2006, SQR, divided this amount by the finished product quantity sold in Exhibit A-30, and then multiplied the result by 0.80. Mittal Steel claims that this calculation results in a conservative estimate of further manufacturing costs when one considers the total sales value of further manufactured goods reported in Exhibit A-30 and certain information in the financial statements of Thomas Steel Strip (Thomas) and Hille and Mueller U.S.A. (Corus' further-manufacturing subsidiaries). Mittal Steel states it then ran a modified version of the Department's margin program using its created database of U.S. further manufactured sales and its computed further manufacturing costs, which resulted in a significant dumping margin for Corus' further-manufactured exports.

Mittal Steel argues that another approach for determining margins for further-manufactured imports under the special rule is identified in the Statement of Administrative Action, Uruguay Round Agreements Act, H.Doc 316, Vol. 1, 103d Cong. 2d Sess. 656 (1994) (SAA). Mittal Steel holds the Department may calculate constructed export price (CEP) based on the price paid to the exporter or producer by the affiliated person for the subject merchandise, if Commerce determines that such a price is appropriate. See Mittal Steel's Case Brief at 8, quoting the SAA at 826. Citing Antidumping Duties; Countervailing Duties; Final Rule (Final Rule), 62 FR 27295, 27353 (May 19, 1997), Mittal Steel claims the Department noted it was reasonable to rely on transfer prices to determine the applicability of the special rule because of the possible use of transfer prices to determine a margin for further-manufactured sales. See Mittal Steel Case Brief at 8 (emphasis Mittal Steel). To implement this approach, Mittal Steel states it took the U.S. sales database it created, changed the sales type (SALEU) from CEP to export price (EP), and set gross unit price (GRSUPRU) equal to the price of the

further-manufactured imports, i.e., the transfer prices from Corus to its affiliated importer.

Mittal Steel contends the results of both of these analyses demonstrate that the Department should collect additional data on Corus' further-manufactured imports and calculate a margin using those data. Mittal Steel asserts that the statute allows the Department to calculate a margin for further-manufactured imports using a surrogate only if it is appropriate to do so, and citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), argues the statute requires the Department to calculate margins as accurately as possible. Therefore, Mittal Steel contends, the Department must consider this in deciding whether it is appropriate to use the margin calculated for non-further-manufactured sales as a proxy for further-manufactured imports.

Corus responds that Mittal Steel essentially is asking the Department to depart from its regulations by requiring Corus to provide full reporting of its sales of further-manufactured imports in order to justify the use of simplified reporting. Corus refers to the Department's June 15, 2006, A Memorandum Regarding Simplified Reporting and Value Added in the United States by Thomas Steel (Value Added Memorandum) at 4 in which the Department preliminarily found the value added in the United States was likely to exceed substantially the value of the imported subject merchandise. The Department also concluded there was a sufficient quantity of sales to provide a reasonable basis for comparison under section 772(e) of the Tariff Act of 1930, as amended (the Tariff Act), and preliminarily found Corus' simplified reporting of sales to Thomas to be appropriate. Corus claims the Department properly concluded that Corus met the statutory criteria, and asserts Mittal Steel does not contest the Department's finding that Corus met these statutory criteria. According to Corus, Mittal Steel's only argument is that there

is a statutory requirement that the margin selected as a proxy produce the most accurate results. Corus further asserts that Mittal Steel construes this requirement as meaning the Department cannot employ the margin determined for other imports if it knows or has reasonable grounds to believe that the use of such margin will not produce the most accurate results possible. See Corus Rebuttal Brief at 4, quoting Mittal Steel Case Brief at 3. Corus contends Mittal Steel's statement is unsupported by the statute or the regulations and cites the Final Rule at 27354, in which the Department stated the burden of performing value-added calculations far outweighed any increase in accuracy achieved by such calculations.

Corus asserts Mittal Steel's arguments amount to nothing more than margin shopping. Referring to Mittal Steel's letters of March 22, 2006, at 6, May 12, 2006, at Exhibit 1, and May 15, 2006, at Exhibits 2 and 3 and Mittal Steel's Case Brief at 7 and 9, Corus lists the margins Mittal Steel has calculated throughout this proceeding and claims these margins show the inaccuracies of Mittal Steel's methodologies. According to Corus, these margins illustrate the fragility of such calculations and their absolute dependence on the assumptions and speculations made in deriving the result. See Corus Rebuttal Brief at 5. Corus claims the arguments raised in Mittal Steel's case brief are no more valid than those in Mittal Steel's earlier submissions, and argues the margin calculation methodology used in Mittal Steel's case brief was similar to the approach used in Mittal Steel's earlier submissions that resulted in margins varying by nearly 100 percentage points. Corus argues using the Department's programs and some of Corus' data coupled with numerous assumptions to calculate margins does not render the resulting margins legitimate and accurate.

Corus contends that accurately backing out further-manufacturing costs from the finished product would be very complex, a burden to the Department, and create less accurate

results. Corus argues the instant case differs from TRBs from Japan, because the further-manufactured material in the instant case is not of the same class or kind of merchandise as the subject merchandise and the Department has never computed margins for further-processed material in prior reviews of hot-rolled steel from the Netherlands. Corus asserts the further-processed material in this case consists mainly of specialized cold-rolled, heat-treated, electroplated and slit steel strip used by battery can makers. Corus argues reporting and analyzing these data would be extremely burdensome and would cancel the benefits to be derived from simplified reporting. Corus argues the acceptance of Mittal Steel's suggestion for full reporting could open the floodgates in a manner that would negate the the statutory provision for simplified reporting. See Corus Rebuttal Brief at 7. Therefore, Corus urges the Department to accept Corus' reporting of Thomas's further-manufactured sales using the simplified reporting methodology.

Department's Position:

The "special rule" for merchandise with value added after importation is defined by section 772(e) the Act as:

> Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison, and the administering authority determines that the use of such sales is appropriate:
>
> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

> If there is not sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) and (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.

Also, 19 CFR 351.402(c)(2) defines "exceed substantially" as meaning the value added in the United States is at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States.

In this case, Corus has demonstrated, and petitioner has not questioned, that the sales in question meet the statutory and regulatory provisions governing the "special rule." Thus, the Department is satisfied the value added is at least 65 percent of the imported subject merchandise and that there is a sufficient quantity of sales to provide a reasonable basis for comparison. We find Mittal's suggestion that we should use transfer prices to be moot, as we have determined the sales to be representative and the value added to be sufficient.

The Department agrees that in this case the further-manufactured material is not of the same class or kind of merchandise as the subject merchandise as it consists mainly of specialized cold-rolled, heat-treated, electroplated and slit steel strip used by battery can makers. However, the Department disagrees with Corus's assertion that reporting these data would be extremely burdensome and would cancel the benefits to be derived from simplified reporting.

The intent of the special rule is to ease the administrative burden for the Department, as the SAA clearly indicates. Moreover, the SAA makes clear that the intent behind the special rule is that "Commerce not be required to perform a precise calculation of the value added. Requiring such a precise calculation would defeat the purpose of the new rule of saving Commerce the considerable effort of measuring precisely the U.S. value added."

Thus, for the reasons outlined in the Value Added Memorandum, and for the reasons outlined above, the Department has not changed its position with respect to these further manufactured imports.

2: General and Administrative (G&A) Expenses

Mittal Steel claims that Corus underreported its G&A expenses through its calculation methodology. Citing Corus' September 8, 2006, SQR at 6-7, Mittal Steel claims Corus shows how its reported G&A expenses approximate the G&A expenses apportioned to its production lines through the budgeting process. Mittal Steel states respondent's calculation goes against the Department's practice of using company-wide G&A expenses to compute a G&A expense rate. Mittal Steel argues that Corus should have reconciled its reported G&A expenses to the total overall G&A expenses for Corus' hot-rolled steel producing entities. Mittal Steel argues those overall G&A expenses should be used to compute its G&A expense rate. However, Mittal Steel suggests that alternatively, the Department could use Corus's total other operating costs from its financial statements to represent Corus' total G&A expenses in the G&A expense ratio calculation.

Corus disagrees with Mittal Steel's allegations. First, respondent contends that Mittal Steel has inappropriately compared two disparate sets of figures: an "other operating cost" expense ratio, from Corus' financial statements, and the reported G&A expenses for entities producing hot-rolled steel. Corus argues this comparison is totally without merit because other operating costs do not equate to G&A expenses.

Second, Corus refutes Mittal Steel's allegation that it has understated its G&A expenses by deviating from the Department's normal G&A expense rate calculation methodology. Corus asserts it appropriately computed its G&A

expense rate and that it allocated G&A expenses to subject merchandise based on the company's total cost of goods sold for companies producing hot-rolled steel, including Corus Staal BV (i.e., the respondent company), CNBV, and the headquarter's expenses incurred by Corus Group (i.e., overall parent company). Corus contends this methodology has been fully verified in past proceedings and, aside from an overstatement of G&A expenses on respondent's own part, the methodology has not been adjusted by the Department in the past. For these reasons, Corus insists the Department should continue to accept its reported costs, including the G&A expenses.

Department's Position:

In the instant case, Corus reported G&A expenses inclusive of its own administrative costs and portions of the administrative costs of its parent companies, CNBV and Corus Group. With regard to the specific amounts, Corus provided detailed supporting documents to explain the amounts included in its total G&A expense figure. For example, the amount of Corus Group's total G&A expenses to be allocated over its cost of goods sold was presented in a worksheet that detailed Corus Group's total operating costs by type of cost, which were reconciled to the financial statements. In that schedule, Corus showed line by line which costs were G&A expenses. Using that total G&A expense figure, Corus computed the amount that should be included in its reported G&A expenses. Accordingly, we are accepting Corus' calculated G&A expense rate based on its unconsolidated financial statements, including an allocated portion of its parent companies' G&A expenses, for the final results. See, e.g., Final Determination in the Antidumping Investigation of Light-Walled Rectangular Pipe and Tube from Mexico, 69 FR 53677 (September 2, 2004) and accompanying Issues and Decision Memorandum at Comment 25, where the Department described its practice of calculating a respondent

company's G&A expense rate based on the respondent company's unconsolidated financial statements, while also including a portion of the parent company's G&A expenses.

3: Constructed Export Price (CEP) Profit Rate

Referring to section 772(f)(2)(C) of the Tariff Act and Calculation of Profit for Constructed Export Price Transactions, Import Administration Policy Bulletin No. 97/1 (September 4, 1997) (Policy Bulletin 97/1), Mittal Steel notes the Department typically calculates the CEP profit rate based on the reported expenses where such data is available. Where such data are not available, the Department bases the CEP profit rate on the profits and expenses incurred in relation to the narrowest category of merchandise which includes the subject merchandise sold in the United States and the exporting country (or sold in all countries when country-specific data are not available). Comparing the CEP profit rate calculated in the preliminary results to the profit rates derived from the income statements of Corus Staal BV and Corus Strip Products IJmuiden (CSPY), Mittal Steel claims the accuracy of Corus' reported expenses in the instant review is questionable.[1]

In relation to Mittal Steel's argument regarding Corus' CEP profit, petitioner suggests Corus' overall cost reporting appears to understate the expenses associated with its sales of hot-rolled steel in the period of review.

Corus maintains it reported its cost data in this review using the same methodologies verified in the investigation and first review and has responded to numerous supplemental questionnaires that establish the validity of its reported cost information.

---

[1] In making this comparison, Mittal Steel relies on business proprietary information that is not susceptible to public summary.

Corus also asserts Mittal Steel cannot question the accuracy of its cost data based on a comparison of profit percentages that are different in nature. First, Corus argues, the Department's CEP profit calculation is based on methodologies that do not relate to how average profitability is calculated in the normal course of business. For example, Corus states, the CEP profit calculation excludes home market sales that fail the arm's-length test and includes downstream sales by Corus's affiliates, whose results are not captured in the CSPY income statement. Corus contends the differences between the artificial CEP profit and actual profit ratios do not render Corus' reported costs inaccurate, but rather show one of the biases built into the Department's standard margin calculation methodology that results in inflated margins. Second, Corus claims, as shown in its sales reconciliation and in Mittal Steel's case brief at 11, the CEP profit rate is based on a subset of CSPY's total sales which is not necessarily representative of the whole. Corus argues that not only is this subset a minor portion of CSPY's total sales, but the U.S. portion of these sales, which are all of prime material, are being made at high prices. Corus maintains U.S. price levels are so high that even with "zeroing" the Department computed a preliminary margin of only 2.52 percent. Therefore, Corus contends the fact that the CEP profit rate is greater than CSPY's average profitability across all products and markets does not make Corus' cost reporting questionable. Corus argues this conclusion is more compelling if Corus Staal's profit rate is used as the point of comparison, since total Corus Staal sales revenue is higher than CSPY's and comes from a wider product range. Similarly, Corus maintains, since the volume of sales of subject merchandise is a small subset of the total products sold by CSPY and Corus Staal, one cannot expect the CEP Profit ratio to be representative of total average profitability.

Department's position:

We agree with Corus. Corus has submitted extensive cost responses covering for example, differences in costs of similar products, explanations of the Corus standard cost system. We obtained cost buildups for selected CONNUMs and reviewed the CONNUM buildups to ensure all appropriate costs (i.e., all the elements of COP) were included. From reviewing these numerous responses, we have determined that Corus reported actual weighted-average POR product-specific costs. As to petitioner's argument regarding the difference in profit rates, we do not believe that comparing profit rates is meaningful because product-specific rates will differ from average rates, which include a multitude of products. Therefore, petitioner's finding of a difference in profit rates is neither unusual nor meaningful.

With respect to the comments on the CEP profit calculation, the Department notes, as does Corus, the CEP profit rate calculated in the preliminary results cannot be compared to the profit rates derived from the income statements of Corus Staal BV and CSPY. For example, as Corus indicates, the CEP profit calculation excludes home market sales that fail the arm's-length test and includes downstream sales by CSBV's affiliates, whose results are not captured in the CSPY income statement. The CEP profit calculation used by the Department is a standard calculation and relies on the cost of production data and sales data submitted by Corus. The Department agrees that since the volume of sales of subject merchandise is a small subset of the total products sold by CSPY and Corus Staal, one cannot expect the CEP profit ratio to be representative of total average profitability.

Moreover, as Mittal Steel itself referenced in its brief, the Department typically calculates the CEP profit rate based on the reported expenses where such data are available. Where such data are not available, the Department bases the CEP profit rate on the profits and expenses incurred in relation to

the narrowest category of merchandise which includes the subject merchandise sold in the United States and the exporting country (or sold in all countries when country-specific data are not available). However, in this case the data were available from the submitted responses. Thus, we have made no changes with respect to the CEP profit calculation.

4. Offsetting Dumped Sales with Non-Dumped Sales

Corus claims the Department acted contrary to the statute by using the zeroing methodology in the preliminary results. Corus states the Department compared the price of individual U.S. transactions with the monthly weighted-average NV and when U.S. price was greater than NV, the Department set the resulting negative margin equal to zero for purposes of computing the overall weighted-average dumping margin. Corus contends sales with negative margins were not given their full mathematical effect in the calculation of the overall weighted-average dumping margin and therefore the Department's methodology resulted in a substantially higher dumping margin, cash deposit rate and assessment rate.

According to Corus, both the Court of International Trade (IT) and the U. S. Court of Appeals for the Federal Circuit (Federal Circuit) have found the statute does not require zeroing in either investigations or administrative reviews, citing *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253, 1261 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) (Corus I) and *Timken Company v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004), *cert. denied, Koyo Seiko Co., Ltd. v. United States*, 125 S. Ct. 412 (Nov. 1, 2004) (Timken), respectively. Further, Corus argues, the CIT has acknowledged that zeroing introduces a statistical bias into the antidumping calculation, citing *Corus I*, 259 F. Supp. 2d at 1263. Despite this, Corus contends the Department has continued to maintain that the statute allows zeroing in administrative reviews, and the courts have found zeroing to be a valid interpretation of the

statute. Corus Case Brief at 5, citing *Timken*, 354 F.3d at 1342-43; *Corus I*, 259 F. Supp 2d at 1264-65; *Corus Staal BV v. United States*, 387 F. Supp. 2d 1291, 1300 (July 19, 2005), *aff'd* 2006 U.S. App. LEXIS 15022 (Fed. Cir. June 13, 2006) (Corus II); and *Corus Staal BV v. United States*, 2006 Ct. Int'l Trade LEXIS 113 at * 8-9 (CIT July 25, 2006) (Corus III).

Corus asserts the Department should find that the statute permits, and U.S. obligations under the WTO Agreement on Antidumping (Antidumping Agreement) require, a different interpretation with respect to zeroing in administrative reviews. Corus argues both the Federal Circuit and the WTO have found the differences between administrative reviews and investigations are irrelevant with respect to zeroing. Corus Case Brief at 5, citing Corus I, at 1347 and United States B Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/ AB/R at (Para.) 135 (WTO App. Body Dec. 15, 2003) (Corrosion-Resistant). Referring to United States—Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/18, Communication by the United States at (Para.) 12 (June 12, 2006), Corus maintains the U.S. Government has reasoned the prohibitions against zeroing are equally applicable to administrative reviews and investigations.

Corus asserts the WTO first found zeroing to be inconsistent with the terms of the Antidumping Agreement in European Communities B Antidumping Duties on Imports of Cotton-Type Bed Linen From India, WT/DS 141/AB/R (WTO App. Body Mar. 1, 2001) (Bed Linen) and later in other determinations involving the United States. More recently, Corus contends the WTO Dispute Settlement Body (DSB) specifically determined in United States B Laws, Regulations and Methodology for Calculating Dumping Margins WT/DS294/R (Panel Rep't Oct. 31, 2005) (Panel Report) that (1) the Department had violated Article 2.4.2 of the Antidumping Agreement in using its zeroing method-

ology in the U.S. antidumping investigation of, inter alia, hot-rolled steel from the Netherlands and (2) the Department's zeroing methodology is a norm which, as such, is inconsistent with Article 2.4.2 of the Antidumping Agreement. Corus Case Brief at 7, citing the Panel Report at (Para.) (Para.) 7.32, 7.105 and 7.106.

Subsequent to the Panel Report, Corus maintains the United States announced a change with regard to its zeroing policy and solicited comments as to the appropriate methodology to use in antidumping investigations. Corus Case Brief at 7-8, citing Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006). Corus argues the WTO Appellate Body then found zeroing was not permissible in an average-to-average comparison methodology in investigations. Corus claims the Appellate Body's decision was not limited to investigations, and states the Appellate Body was unequivocal with respect to the impermissibility of zeroing in the antidumping administrative reviews at issue therein. Corus Case Brief at 8, citing United States B Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (App. Body Rep't Apr. 18, 2006) (Appellate Body Report) at (Para.) 263.

Corus states the DSB adopted the Panel Report as modified by the Appellate Body Report (collectively, WTO Final Report on Zeroing) on May 9, 2006. Corus holds the United States subsequently entered into an agreement to implement the WTO Final Report on Zeroing findings by April 9, 2007, citing United States—Laws, Regulations and Methodology for Calculating Dumping Margins, Agreement under Article 21.3(b) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS294/19 (Aug. 1, 2006).

Citing Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping

Investigation; Final Modification, 71 FR 77722 (December 27, 2006) and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 FR 1704 (January 16, 2007), Corus asserts that effective January 23, 2007, the Department abandoned the use of zeroing in the context of average-to-average comparisons in investigations. Corus asserts that implementation of the WTO's determination as to the antidumping investigation underlying the order on hot-rolled steel from the Netherlands will result in a negative dumping margin being calculated and the order being revoked. Moreover, Corus contends the same logic relied upon by the Appellate Body to prohibit the use of zeroing in investigations can be applied to administrative reviews. According to Corus, the Appellate Body recently determined that zeroing was inconsistent with WTO obligations "as such" when utilized "in the context of both average-to-average and transaction-to-average calculations in antidumping investigations, antidumping administrative reviews, and new shipper reviews, and found the reliance on zeroed margins in sunset reviews to constitute an as applied' violation of the Antidumping Agreement." Corus Case Brief at 4 and 10, citing United States B Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R at (Para.) & 137, 156, 165 and 185 (Jan. 9, 2007) (United States—Zeroing (2007)).

Based on the foregoing, Corus argues the Department's use of zeroing is unreasonable under U.S. law. Accordingly, Corus urges the Department to modify its practice to eliminate zeroing for these final results.

U.S. Steel responds that contrary to Corus' claim, zeroing is required by the statute while Mittal Steel and Nucor contend that Corus' approach is unreasonable under U.S. law. Both U.S. Steel and Nucor argue that section 777A(d) of the Act sets forth the methodology to be used in calculating

dumping margins. U.S. Steel and Nucor hold that in investigations without targeted dumping, the Department is instructed to use the average-to-average comparison methodology, whereas in investigations with targeted dumping and in administrative reviews, the Department is to use the average-to-transaction comparison methodology. U.S. Steel and Nucor assert that if zeroing is not used, a respondent's dumping margin will always be the same regardless of which methodology is employed, because without zeroing all positive margins are offset by all negative margins under both methodologies. U.S. Steel and Nucor maintain this principle has been acknowledged by the U.S. Government and several WTO Panels, citing, inter alia, Opening Statement of the United States at the First Substantive Meeting of the Panel in United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R (Mar. 16, 2005) (United States - Zeroing (2006)) at 5, (Para.) 13 and the Panel Report at 142, (Para.) 7.266. U.S. Steel and Nucor claim it would have been pointless for Congress to amend the statute in 1995 to require a specific comparison methodology for each of these three scenarios if both the average-to-average and average-to-transaction comparison methodologies yielded the same result. Citing various Federal Circuit and Supreme Court decisions, U.S. Steel and Nucor argue that the rules of statutory construction require a statute to be interpreted in a manner that prevents any provision of that statute from being rendered meaningless. Therefore, U.S. Steel and Nucor contend, the statute must be construed to give effect to the different methodologies set forth in section 777A(d) of the Act, and the only way to do so is to use zeroing.

Even if zeroing were not required by the statute, U.S. Steel contends, it is definitely a reasonable interpretation of the statute. U.S. Steel and Nucor assert that every U.S. court that has examined this issue has upheld the Department's use of zeroing as a reasonable and allowable interpretation of the

statute, citing, inter alia, Corus I at 1347-49; Timken, at 1334, 1342-43, 1345; Corus II; and Corus III. U.S. Steel maintains the Federal Circuit has found zeroing to be in accordance with the statute in both investigations and administrative reviews, citing Corus I and Timken. U.S. Steel and Nucor claim the Federal Circuit found that WTO decisions are not binding on the United States and cannot override U.S. law, citing Corus I, at 1347-49 and Corus III. U.S. Steel states the Federal Circuit's ruling in Corus I is equally applicable to United States—Zeroing (2007). Nucor argues that Corus does not provide any arguments or information in its case brief that prescribe a different outcome from that reached in every previous instance by the Department and the courts.

U.S. Steel argues that even if the Department had the legal authority to abandon zeroing based on the WTO's decisions, the implementation process is not relevant here. U.S. Steel holds that in United States—Zeroing (2006), the WTO Appellate Body determined that zeroing was inconsistent with the Antidumping Agreement in the context of the 16 administrative reviews challenged by the European Commission, but did not find that zeroing was inconsistent with the Antidumping Agreement "as such" in all administrative reviews. Therefore, U.S. Steel claims, United States—Zeroing (2006) cannot possibly have any bearing on the instant review.

U.S. Steel, Mittal Steel, and Nucor state that under sections 123 and 129 of the Uruguay Round Agreements Act (URAA), the Department must implement any WTO decisions in accordance with the statutory requirements for implementation, which include consultations with Congress. Specifically, Mittal Steel contends that, pursuant to section 129(b)(1)-(4) of the URAA, once a WTO panel or Appellate Body report has been issued, the U.S. Trade Representative (USTR) must consult Congress and the administering authority; the USTR may then ask the Department to issue a

determination within 180 days that would render its action not inconsistent with the WTO report; the USTR must consult again with the Department and the relevant congressional committees; and only then can the USTR direct Commerce to implement the determination. Nucor holds this process has only recently been initiated with respect to the use of zeroing in investigations as per United States—Zeroing (2006), but the Department has not initiated any reconsideration of its zeroing methodology as it pertains to administrative reviews. Regarding United States—Zeroing (2007), which was issued on January 9, 2007, U.S. Steel and Mittal Steel contend that decision is not final since it has not yet been adopted by the WTO DSB and the statutory process for implementation of the Appellate Body's findings has not begun or even been announced yet.

In addition, U.S. Steel and Mittal Steel contend that even if a change were made to U.S. law, it would not apply to the instant review, because under U.S. law adverse WTO dispute settlement decisions are prospective only. U.S. Steel and Mittal Steel maintain that in keeping with section 129(c)(1)(B) of the URAA, WTO decisions apply only to unliquidated entries of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the administering authority is directed to implement that decision. Mittal Steel maintains that since all of the entries subject to the instant review were entered or withdrawn for consumption prior to November 1, 2005, these entries will not be affected by any changes that may be implemented as a result of the 2007 WTO Appellate Body report.

Mittal Steel also contests Corus' assertion that the Department's current methodology does not give sales at fair value their "full mathematical effect." Mittal Steel maintains the Department's current practice is to include fairly-traded imports in the denominator of the dumping margin. If the intent of the Department's dumping margin calculation is to

reduce the harm to the domestic industry that is caused by unfairly-traded imports, Mittal Steel asserts, then fairly-traded imports have been given their full mathematical effect under the Department's current approach. Mittal Steel holds that calculating a dumping margin with offsets only makes mathematical sense if the purpose of the calculation is to determine the economic viability of a foreign producer's foreign exports.

Based on the foregoing, U.S. Steel, Mitttal Steel, and Nucor urge the Department to reject Corus' arguments regarding zeroing and to continue calculating dumping margins without offsetting for non-dumped sales.

Department's Position:

We agree with U. S. Steel, Mittal Steel, and Nucor and have not changed our calculation of the weighted-average dumping margin as suggested by Corus for these final results.

Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price and constructed export price of the subject merchandise." (Emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, Commerce interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, Commerce will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. *Timken Co. v. United States*, 354 F. 3d 1334, 1342 (Fed. Cir.), *cert. denied sub nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004).

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to US—Softwood Lumber, consistent with section 129 of the URAA, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. 3538.

With respect to United States—Zeroing (2006), Commerce recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, Commerce declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect.

As such, the Appellate Body's reports in US - Softwood Lumber and United States—Zeroing (2006) have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See *Timken*, 354 F. 3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

According to Corus, the Appellate Body recently determined that zeroing was inconsistent with WTO obligations "as such" when utilized "in the context of both average-to-average and transaction-to-average calculations in antidumping investigations, antidumping administrative reviews, and

new shipper reviews, and found the reliance on zeroed margins in sunset reviews to constitute an as applied' violation of the Antidumping Agreement." Corus Case Brief at 4 and 10, citing United States - Zeroing 2007 at 137, 156, 165, and 185. Thus, Corus argues the Department's interpretation of the statute is inconsistent with the United State's international obligations and, therefore, unreasonable.

Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA at 354 ("[a]fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is not inconsistent' with the panel or Appellate Body recommendations. . .)." Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department will continue with its current approach to calculating and assessing antidumping duties in this administrative review.

Finally, we note that, as a result of the implementation of the Section 129 determination, the antidumping duty order on hot-rolled steel from the Netherlands has been revoked. In anticipation of Corus questioning the propriety of assessing antidumping dumping duties on these pre-revocation entries, the Department notes that Section 129 of the URAA is clear that any implemented determination resulting from such a proceeding is effective with respect to unliquidated entries that enter or are withdrawn from the warehouse on or after the date that USTR directs the Department to implement the determination. That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated

entries; however, the SAA makes clear that such entries remain subject to potential duty liability. SAA at 1026

In this instance, the Department is not altering its administrative review determination as a result of the post-POR prospective revocation of the order. The combination of clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability suggests that Congress clearly anticipated that antidumping duty liability on pre-implementation entries need not be foregone. While the Department lacks sufficient experience with such situations to establish general guidelines, in this instance, the issue is one of pure law that involves different considerations as between investigations and reviews (as reflected in the clear limitation of the Department's December 27, 2006 modification to investigations involving average-to-average comparisons) and, notwithstanding the decision to implement the report, the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded. For these reasons, the Department declines to consider giving any broader retrospective effect to the revocation of the order.

For the reasons mentioned above, we have not changed our calculation for these final results.

5. Classification of JIT Deliveries as CEP Sales

For the preliminary results, Corus states the Department classified Corus' just-in-time (JIT) sales to one unaffiliated U.S. customer as CEP transactions, based on the fact that Corus' final invoices established the material terms of sale and the final invoices for the JIT sales were issued after the merchandise entered the United States. Corus claims the Department's decision directly contravenes the legal precedent established in the investigation and the first administrative review of this case, both of which were affirmed by

the CIT. Corus Case Brief at 12, n.5 and n.6, citing Corus I, at 1253 and Corus II, at 1291, respectively. Corus argues that during the investigation, the Department found the frame agreements between Corus and its customers were confirmation of a sale or an agreement to sell. Citing Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 FR 22146, 22149 (May 3, 2001) (Hot-Rolled Preliminary Determination), Corus holds that because its U.S. affiliate, Corus Steel USA Inc. (CSUSA), signed the frame agreements in the United States on behalf of Corus Staal BV, the Department determined the U.S. locus of the frame agreements meant the transactions were CEP transactions. In other words, Corus asserts, the Department found the frame agreements were controlling for determining whether sales were EP or CEP, and invoices were controlling for date of sale. Corus Case Brief at 13, citing Hot-Rolled Preliminary Determination at 22147-48. Since the investigation, Corus claims all final written confirmations of the frame agreements have been executed by Corus in the Netherlands. As a result, Corus contends, in the first administrative review, the Department classified Corus' U.S. sales as EP or CEP sales based on where and by whom the frame agreements were signed. Specifically, Corus asserts the Department classified the transactions as CEP sales when the frame agreements were signed in the United States and as EP sales when the frame agreements were signed outside the United States, citing Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review, 68 FR 68341, 68344 (December 8, 2003) (Hot-Rolled First Review Preliminary Results). Corus maintains the CIT upheld the Department in this determination, citing Corus II, at 1297.

According to Corus, there have been no changes in the fact pattern or to the statute since the first administrative review. Therefore, Corus argues, in the instant review the Department

should also determine that where Corus Staal BV concludes the frame agreements for U.S. sales in the Netherlands and acts as the importer of record, the corresponding sales must be classified as EP transactions in accordance with the statute. Citing *Davila-Bardales v. INS*, 27 F. 3d 1, 5 (1st Cir. 1994) (Davila-Bardales) (quoting *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir. 1989), Corus contends parties subject to antidumping orders are entitled to have the law applied consistently and to make business decisions accordingly.

Corus asserts the Department misinterpreted the statute in preliminarily determining its JIT sales were misclassified as EP sales. Corus states section 772(a) of the statute defines export price as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States . . ." (emphasis added by Corus). Corus contends the Department should have considered the event that occurred first, and under the statute the first event can be an agreement to sell. However, Corus argues, in the preliminary results the Department focused solely on the final sale, as embodied in the final invoice to the customer, and in doing so, relied on the criteria used to determine date of sale. Corus maintains the Department has acknowledged the date of sale, on which the material terms of sale are set, can differ from the date on which the terms of sale are first "agreed upon" by the parties, such as in a frame agreement. Corus Case Brief at 16, citing the Final Rule at 27348. Corus claims that by limiting its consideration of the statutory definition of EP to situations satisfying the date of sale criteria, the Department imposed an extra-statutory standard. Further, Corus maintains, by defining "agreed to be sold" in exactly the same way it defines a sale, the Department improperly negated the "agreed to be sold" provision in the statute.

Corus claims that while Congress gave the Department authority to determine "date of sale," the same cannot be said for distinguishing between EP and CEP transactions. Citing *A.K. Steel Corp. v. United States*, 226 F.3d 1361, 1367, 1372 (Fed. Cir. 2000) (AK Steel), Corus contends the Federal Circuit examined whether Congress intended to make a delegation to the Department regarding the definitions of EP and CEP in sections 772(a) and (b) of the statute and found that Congress had not made such a delegation. Corus asserts that "[t]he Department is not free to interpret the statute and introduce its own practice—namely, supplanting the statutory phrase first sold (or agreed to be sold)' with its definition of date of sale.'" Corus Case Brief at 17-18.

In addition, citing *Ishida v. United States*, 59 F.3d 1224, 1230 (Fed. Cir. 1995), Corus argues a fundamental canon of statutory construction requires that an administering body interpret a statute in a manner "that avoids rendering superfluous any provision of a statute." Thus, Corus contends, the Department should have considered the term "first" and the phrase "or agreed to be sold" in the statute. Corus claims that if the Department followed the statute, it should have determined that Corus' JIT sales were EP sales based on the frame agreements, as these clearly evidence an "agreement to sell" "before importation" "outside of the United States." At the very least, Corus asserts the Department should have recognized Corus' issuance of pro forma invoices at the time the merchandise left the Netherlands qualified as an "agreement to sell" prior to importation. As the pro forma invoices are also issued "before importation" and "outside of the United States," Corus claims the Department's classification of its JIT sales as CEP sales was contrary to law.

Corus argues the Department's preliminary results ignored the facts establishing that Corus' JIT sales meet the statutory definition for EP sales. Corus claims the record shows that Corus and its JIT customer entered into a frame agreement

prior to the merchandise being imported into the United States. See Corus case brief at 18. Citing the Preliminary Results at 71523-30, Corus asserts the Department does not dispute the frame agreement is executed outside of the United States and prior to importation. Corus claims the merchandise is first agreed to be sold at the time of the frame agreement, citing Exhibit A-26 of its April 28, 2006 SQR. Corus argues it is irrelevant that the terms established in the frame agreement are subject to change, as it is the possibility of change that allows for the distinction between an agreement for sale and the final date of sale. In addition, Corus argues the pro forma invoices it issues to its U.S. JIT customer prior to export from the Netherlands are evidence of an agreement between Corus and its JIT customer to sell subject merchandise. Without such an agreement, Corus maintains it would not have manufactured and shipped such a large quantity of steel to the JIT customer.

Corus cites the Department's Preliminary Results at 71526, in which the Department found that, due to Corus' resale of merchandise originally destined for the JIT customer to another U.S. customer, Corus' JIT sales did not meet the criteria for EP sales where the first sale to an unaffiliated party occurs before importation. As a result, Corus argues, the Department determined the frame agreement could not govern the sale between the JIT customer and Corus because an order was cancelled after importation and sold to another customer in the United States. Corus Case Brief at 21, citing Preliminary Results at 71526. Corus maintains that just as the Department acknowledges there can be post-date-of-sale corrections, it should find post-agreement corrections are also possible. Corus maintains the Department should not have reclassified all of Corus' JIT deliveries as CEP sales simply because of the single cancelled JIT sale and at most the Department should have reclassified just the single canceled JIT sale as a CEP transaction.

Finally, Corus cites the Hot-Rolled First Review Preliminary Results at 68344, in which the Department referred to the Federal Circuit's finding in AK Steel that the statutory definitions of EP and CEP focused on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated. In the instant review, Corus contends the Department has ignored the location and identity of the seller as set forth in AK Steel, and instead has focused on when the material terms of sale were set. Corus argues its JIT sales are unlike those at issue in AK Steel, which the Federal Circuit found were between the U.S. affiliate and the unaffiliated U.S. customer. Corus Case Brief at 23, citing *AK Steel*, 226 F.3d at 1372. In contrast to the facts of AK Steel, Corus contends there is no question in the instant review that Corus Staal BV is the "seller" and the entity passing title to the unaffiliated U.S. customer, not Corus Staal's U.S. affiliate. Corus cites AK Steel, at 1370, in which the Federal Circuit stated that "[c]lassification as an EP sale requires that one of the parties to the sale be located outside the United States.'" Corus argues that Corus Staal BV is unquestionably a party to the JIT transactions at issue, whether measured by the frame agreements, pro forma invoices or final invoices and is also clearly located outside the United States. Citing the Preliminary Results at 71526 and its February 9, 2006 section A QR at A-12 and A-23-24, Corus argues that during the POR Corus Staal BV executed all frame agreements and there was no countersignature by the JIT customer; Corus Staal BV issued all pro forma and final invoices; and Corus' U.S. affiliate never took title to the goods.

Based on the foregoing, Corus urges the Department to classify its JIT sales as EP sales for these final results.

Mittal Steel claims the Department's determinations with respect to Corus' JIT sales have been consistent throughout the history of this order. Mittal Steel notes in the investigation, the Department found that CSUSA provided the

final written confirmation to the U.S. customer establishing prices and quantities and therefore the Department concluded the merchandise was "sold (or agreed be to sold)" in the United States. In the first administrative review, Mittal Steel asserts the Department classified sales where the contracts were concluded in the United States as CEP sales.

U.S. Steel, Mittal Steel, and Nucor assert that in the second administrative review, the Department found Corus' JIT sales were clearly CEP sales, citing Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 70 FR 18366 (April 11, 2005) (Hot-Rolled Second Review) and the accompanying Issues and Decision Memorandum at Comment 2. Mittal Steel argues the Department made this determination based on the fact that "[t]here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e., price and quantity) until the final invoice was issued after importation of the subject merchandise.'" Mittal Steel Rebuttal Brief at 6, quoting Hot-Rolled Second Review and the accompanying Issues and Decision Memorandum at Comment 2. U.S. Steel and Nucor maintain the CIT upheld this finding. Citing Corus III, at 7-14, U.S. Steel and Nucor contend the CIT determined that the sale or agreement to sell for Corus' JIT transactions occurred when the final invoice was issued after importation into the United States, and thus the CIT found the Department had properly classified Corus' JIT sales as CEP transactions. U.S. Steel also asserts the CIT stated "Commerce is free to change its position on frame agreements from the investigation and the previous review because it has fully explained its reasons for doing so.'" See Mittal Steel Rebuttal Brief at 9, n. 28, citing Corus III, at 11 n. 6. Likewise, Nucor argues the Department is always free to modify its methodologies and approaches, even within reviews of the same antidumping duty order, as long as it gives a valid explanation for doing so, citing *Luoyang Bearing Corp. v. United States*, 347 F.

Supp. 2d 1326, 1362 (CIT 2004). U.S. Steel, Mittal Steel, and Nucor contend the Department's determination in the instant review that Corus' JIT sales are properly considered CEP sales is consistent with the second administrative review.

For Corus' JIT sales, U.S. Steel asserts the sale or agreement to sell clearly took place after the goods entered the United States. U.S. Steel holds the phrase "first sold (or agreed to be sold)" as used in the statute does not refer to the first time the buyer and seller come to an agreement, but rather to the first sale to an unaffiliated customer, which could be the actual sale (i.e., the transfer of title and consideration) or the contract between buyer and seller establishing the essential terms of sale and requiring such a sale to take place. U.S. Steel Rebuttal Brief at 8-9, n. 27, citing *AK Steel*, 226 F.3d 1361, 1371.

Similarly, Nucor argues the CIT has found that a "sale" refers to a transfer of ownership and "an agreement to sell" refers to an agreement to transfer ownership of an item. Nucor Rebuttal Brief at 10-11, citing Corus III, 2 at 12-13. Thus, Nucor contends, "an agreement to sell" cannot occur until and unless the material terms overseeing the transfer of ownership are set. Since Corus' frame agreements do not establish the material terms of sale, and those terms are subject to change until invoicing, Nucor argues these frame agreements are best viewed as agreements to agree, and the Department may correctly conclude that no actual agreement to sell occurred until after importation. *Id.* at 11.

Mittal Steel also contends an agreement to certain sales terms without an agreement on price or quantity is not a sale or agreement to sell. Mittal Steel cites Corus III, at 12-13, wherein the CIT held "in order for a sale or agreement to sell to have occurred, the parties must have settled upon the price and quantity involved in the transaction with complete or at least near certainty." Mittal Steel argues that if Corus' framework agreements were considered agreements to sell

pursuant to section 772(a) of the Act, then the price must be the price established at the time of the framework agreement. Mittal Steel asserts the statute precludes any distinctions between the date of sale (i.e., the date on which price and quantity are set) and the date when merchandise is agreed to be sold. Based on Corus' reading of the statute, Mittal Steel claims, a respondent could enter into a framework agreement for several years and no matter when a sale actually took place or at what price, the price of any sale would be that set at the time of the framework agreement. Mittal Steel argues this would mean that actual pricing would be ignored and a respondent could make actual sales for less than fair value as long as it set high prices in a framework agreement. Thus, Mittal Steel asserts, the logic of the statute clarifies that the phrase "agreed to be sold" refers to an agreement which includes actual price and quantity, not Corus' framework agreements.

Nucor contests Corus' argument regarding its pro forma invoices, arguing the CIT did not consider these invoices to be agreements to sell. Nucor Rebuttal Brief at 11-12, citing Corus III. Nucor argues that because Corus' pro forma invoices do not reflect fixed material terms, they are not agreements to sell for purposes of the EP definition. Nucor asserts the cancellation of JIT sales emphasizes the fact that the pro forma invoices could not possibly reflect fixed sales terms, since the actual purchaser was not in the picture yet. Since no sale or agreement to sell was made until after importation, Nucor holds these sales are precluded from EP consideration.

Finally, Mittal Steel maintains the Department's interpretation of "export price" is in line with AK Steel. Citing AK Steel, at 1370, Mittal Steel holds the Federal Circuit found the phrase "outside the United States" in the EP definition refers to the "locus of the transaction," not the locus of the seller. Mittal Steel further cites AK Steel, at 1369, in which the

Federal Circuit stated the "plain meaning of the language enacted by Congress in 1994 focuses on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated, making these two factors dispositive of the choice between the two classifications." Thus, Mittal Steel asserts, even if a sale takes place between the producer and an unrelated U.S. purchaser, it is a CEP sale if the transaction occurs in the United States. Mittal Steel argues that in the instant review, while the JIT sales may be considered a sale between the producer and an unrelated U.S. purchaser, they clearly have been made in the United States.

Accordingly, U.S. Steel, Mittal Steel and Nucor assert the Department should continue to treat Corus' JIT transactions as CEP sales for these final results.

Department's Position:

The Department had not changed its position with respect to Corus's JIT sales to one unaffiliated U.S. customer. The Department classified such sales in the preliminary results as CEP transactions, based on the fact that Corus' final invoices established the material terms of sale and the final invoices for the JIT sales were issued after the merchandise entered the United States. This is in line with Hot-Rolled Second Review, and the accompanying Issues and Decision Memorandum at Comment 2. In the Hot-Rolled Second Review the Department made its determination based on the fact that "[t]here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e., price and quantity) until the final invoice was issued after importation of the subject merchandise." See Hot-Rolled Second Review and the accompanying Issues and Decision Memorandum at Comment 2.

The CIT upheld this finding. See Corus III, 2006 at 7-14. The CIT determined that the sale or agreement to sell for Corus' JIT transactions occurred when the final invoice was

issued after importation into the United States, and thus the CIT found the Department had properly classified Corus' JIT sales as CEP transactions.

Regarding Corus's allegation that the Department changed its position on this issue, the CIT determined "Commerce is free to change its position on frame agreements from the investigation and the previous review because it has fully explained its reasons for doing so." See *Corus III at 11 n. 6 and Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1362 (CIT 2004).

Moreover, the Department disagrees with Corus's assertion that the Department classified Corus' JIT deliveries as CEP sales simply because of the single cancelled JIT sale and Corus's suggestion that at most the Department should have reclassified just the single canceled JIT sale as a CEP transaction. Rather, the cancellation of JIT sales emphasizes the fact that neither the pro forma invoices nor the framework agreements could possibly reflect fixed sales terms, since the actual purchaser can change after the importation of the goods. Since no sale or agreement to sell was made until after importation, the Department continues to hold these sales are precluded from EP consideration and were correctly classified by the Department as CEP sales.

6. Duty Absorption

Corus argues the statutory criteria for conducting a duty absorption inquiry were not met and thus the Department acted contrary to law in conducting such an inquiry. Citing section 751(a)(4) of the Act, Corus contends a duty absorption inquiry as to a foreign producer or exporter is allowed only where subject merchandise is sold through an importer affiliated with the foreign producer or exporter. Corus asserts the record shows that Corus Staal BV is both the producer/exporter and the importer of the subject merchandise. Corus claims no U.S. sales of subject merchandise were made

during the POR through an importer affiliated with Corus Staal BV.

Corus cites the Preliminary Results at 71525-26, in which the Department stated it made a duty absorption determination "[b]ecause Corus Staal BV sold to unaffiliated customers in the United States through itself as the importer of record." Corus maintains the Department's justification for conducting a duty absorption inquiry directly contradicts Supreme Court precedent. According to Corus, in *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (Barnhart), the Supreme Court examined whether an entity can be affiliated with itself and found that a "related person" is a separate entity. Corus Case Brief at 26, citing *Barnhart*, 534 U.S. at 456. Corus argues it is therefore not logical for the Department to find that Corus Staal BV, as the producer/exporter, is affiliated with itself as the importer of record, nor was it logical for the CIT to uphold such a finding. *Id.*, citing Corus III.

Corus contends the Department's justification for conducting a duty absorption inquiry is also contrary to section 771(33) of the Act, which defines "affiliated" and "affiliated persons." Corus asserts this provision is consistently written in the plural, meaning there must be two entities in order for affiliation to exist. Addressing subparagraphs (A) through (G) of section 771(33) of the Act, Corus also argues that none of the definitions therein apply to the instant case (e.g., Corus is not a member of a family, officers/directors are not implicated, etc.). Thus, based on section 771(33) of the Act, Corus contends Corus Staal BV as producer/exporter cannot be affiliated with Corus Staal BV as importer.

Corus holds the Federal Circuit has found that duty absorption inquiries can only be made in accordance with the statute, citing *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 818 (Fed. Cir. 2002). Corus claims that Congress has defined duty absorption inquiries as appropriate solely in

situations in which U.S. sales are made through an importer affiliated with a foreign exporter or producer.

Corus argues the Department's duty absorption analysis basically provides that if a respondent is dumping, the respondent also is presumed to be absorbing duties and the burden falls on the respondent to show otherwise. Citing Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 65 FR 13943 (March 15, 2000) (Gray Portland Cement) and the accompanying Issues and Decision Memorandum at Comment 26, Corus maintains that to rebut this presumption, a respondent must demonstrate there is an irrevocable agreement between the affiliated importer or producer and the unaffiliated purchaser showing the unaffiliated purchaser will pay the antidumping duties. Corus claims the CIT has previously found this requirement to be commercially unreasonable and likely unenforceable, citing *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 155 F. Supp. 2d 801 (2001) (Fabrique de Fer de Charleroi). Corus argues the Department has found the customer's written promise to pay antidumping duties to be the most persuasive evidence of the passing on of costs, citing Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 FR 69694, 69704 (December 14, 1999).

Although a respondent has the opportunity to rebut the presumption that duties are being absorbed, Corus claims the Department has yet to accept the evidence presented by any respondent as satisfactory, citing, among others, Stainless Steel Wire Rod From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 57879 (October 7, 2003) and Gray Portland Cement. Thus, Corus contends, even if the Department's presumption is rebuttable in the abstract, the fact that the Department has

shown the presumption to be de facto irrebuttable for 10 years renders that presumption unlawful.

In addition, Corus argues, the Department has yet to establish any quantitative criteria for conducting duty absorption inquiries. Citing the Final Rule at 27318, Corus asserts that in 1997 the Department noted it would proceed on an ad hoc basis with respect to duty absorption inquiries. Corus claims that up until the present time, the Department has relied merely on whether sales have been made at less than NV as evidence of duty absorption.

Corus argues the statute clearly mandates the Department to do more than simply presume duty absorption is occurring in situations in which there is a dumping margin. According to Corus, the Department's duty absorption standard is unlawful because it does not consistently apply the word "determine" as utilized in sections 751(a)(1) and 751(a)(4) of the Act. Quoting these two provisions, Corus contends the Congress granted the Department authority to determine the amount of antidumping duties due and to determine whether antidumping duties have been absorbed. Citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (*Sullivan v. Stroop*), Corus argues a pillar of statutory construction is that the same words or phrases in the statute should be given the same meaning. Thus, Corus holds, the word "determine" cannot be interpreted to require a detailed analysis for one provision and an automatic presumption for the other.

Corus asserts the WTO Appellate Body also has analyzed the word "determine" in Article 11.3 of the WTO Antidumping Agreement with respect to the Department's sunset reviews. Citing Corrosion-Resistant at (Para.) (Para.) 114-15 and 178, Corus contends the Appellate Body found the word "determine" required the Department to conduct a more rigorous investigation in sunset reviews and precluded the Department from merely presuming that a likelihood of continued or resumed dumping exists.

Finally, Corus maintains there is no evidence on the record showing that Corus absorbed or did not pass on duties. Rather, Corus argues, the record shows it negotiated terms and prices with its U.S. customers with the intention of passing on dumping duties to those customers. In making this statement, Corus refers to the agreement in its February 9, 2006, submission (duty absorption response) at Exhibit A which, Corus claims, contains "a standard provision protecting Corus should its U.S. price provision decline over time." Corus Case Brief at 33.

U.S. Steel, Mittal Steel, and Nucor respond that the Department properly conducted a duty absorption inquiry and found that Corus was absorbing duties. Mittal Steel and Nucor state the Department conducted a duty absorption inquiry in the second administrative review and that the CIT upheld the Department's duty absorption finding, citing Corus III, at 14-17. U.S. Steel and Nucor argue the CIT specifically has found it proper for the Department to conduct a duty absorption inquiry as to a foreign producer or exporter that also acted as importer of record, citing Agro Dutch Indus., Ltd. v. United States, CIT Slip Op. 06-40 (Mar. 28, 2006).

U.S. Steel, Mittal Steel, and Nucor disagree with Corus' assertion that the Department has established an irrebuttable presumption that duty absorption is occurring where there is dumping. U.S. Steel argues that in Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005), the respondent provided evidence rebutting the presumption of duty absorption and the Department made a finding of no duty absorption. Both U.S. Steel and Mittal Steel contend it is appropriate for the Department to shift the burden onto the respondent to show that antidumping duties will be paid fully by the unaffiliated purchaser, because the respondent is the only party to the proceeding able to provide such evidence. Since Corus is the party possessing the

information relevant to duty absorption and has not provided any such information, Mittal Steel holds the Department has presumed reasonably that Corus is absorbing duties. Nucor asserts the Department preliminarily found that Corus sold subject merchandise at dumped prices during the POR and under the Department's long-standing practice it is Corus' responsibility to provide sufficient evidence to rebut the presumption of duty absorption. Nucor argues Corus has not done so and thus the Department has substantial record evidence to find that duty absorption did occur during the POR. Rather than outlining its efforts to devise an enforceable agreement with its customers regarding antidumping liabilities or showing it is commercially unable to enter into such an agreement, Nucor argues, Corus concedes its "contract provisions do not allow for the retroactive collection of any additional antidumping duties ultimately assessed on the subject merchandise.'" Nucor Rebuttal Brief at 16-17, citing Corus' February 9, 2006, QR at 9.

U.S. Steel and Nucor contend the Department's initial presumption of duty absorption is reasonable because the continued existence of dumping shows the producer and its affiliate have not adjusted their prices to curb dumping. In support of this assertion, Nucor cites Gray Portland Cement and the accompanying Issues and Decision Memorandum at Comment 26. Nucor claims the Department's decision in the instant review is consistent with its long-standing practice. Nucor holds that as early as 1997, the Department stated the existence of a dumping margin raises the initial presumption the respondent and its affiliated importer are absorbing duties, citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043, 54046 (October 17, 1997). Nucor claims nothing about the Department's duty absorption inquiries is ad hoc, stating that if there is a dumping margin the respondent must produce an enforceable agreement between itself and the first unaffiliated

purchaser in which the latter agrees to pay all dumping duties associated with the sale. U.S. Steel claims the Department appropriately conducts duty absorption inquiries on a case-by-case basis, arguing that in Fabrique de Fer de Charleroi, the CIT found the Department has discretion under the statute to consider the relevant evidence and make duty absorption findings on a case-by-case basis.

U.S. Steel and Mittal Steel refer to Corus' statement in its case brief that the terms and conditions of its U.S. sales contain "a standard provision protecting Corus should its U.S. price provision decline over time." U.S. Steel claims this standard provision cannot be equated with a requirement that the unaffiliated purchaser pay antidumping duties and as such, the record contains no evidence that duties were not absorbed. Mittal Steel contends that it summarized in its February 28, 2006, letter the reasons why the Department should not rely upon this "standard provision" as proof that antidumping duties were not absorbed.

Finally, both Mittal Steel and Nucor respond to Corus' argument regarding the use of the word "determine" in the statute. Mittal Steel argues the Department depends upon respondents to provide information in making both dumping duty and duty absorption determinations, and as part of the instant review it sought information pertinent to both issues. To the extent the Department received information regarding either issue, Mittal Steel claims the Department relied upon that information in making its dumping and duty absorption determinations. Quoting Webster's New College Dictionary (3d ed. 2005) at 315, Nucor asserts the word "determine" means "to decide or settle—authoritatively and conclusively." Nucor contends this definition, and by extension the statute, does not require that the question of duty absorption be resolved by either a massive investigation or a rebutable presumption. Instead, Nucor maintains, Congress only intended for the Department to decide or settle, authori-

tatively and conclusively, whether duties were absorbed. Arguing that Corus' cite to *Sullivan v. Stroop* for the canon of statutory construction is inapposite, Nucor asserts that "determine" is a single word with a vague and broad definition and there are no cross-references for "determine" in the statute that direct the Department to make a "determination" using a certain approach. With respect to Corus' reference to the WTO Appellate Body's analysis of the word "determine," Nucor contends the Appellate Body's opinion is not binding on the Department, has no formal application in U.S. law, and did not even relate to duty absorption inquiries. While the WTO Appellate Body found that a "determination" in a sunset review cannot be based on presumptions or assumptions, Nucor holds, there is nothing in the word's definition that prevents such a finding.

Department's Position:

The Department notes that it conducted a duty absorption inquiry in the second administrative review and that the CIT upheld the Department's duty absorption finding. See Corus III. With respect to Corus's claim that Corus Staal is both the producer and exporter and cannot be affiliated with itself as the importer, the Department noted in the preliminary results that the CIT addressed this issue when it decided "Commerce's interpretation of affiliated' to include exporters importing through themselves has been found to be a permissible construction of the statute." See *Corus Staal BV v. United States*, 2006 Ct. Intl. Trade LEXIS 113 (CIT 2006) at note 10. That decision quoted approvingly *Agro Dutch Indus. v. United States*, 2006 Ct. Intl. Trade LEXIS 41 (CIT 2006):

> Commerce's interpretation of subsection 1675(a)(4) appears to be a reasonable, common-sense solution to what Congress attempted to accomplish with its enactment. This conclusion is inherent from the statute's focus—upon duty absorption in the foreign producer or ex-

porter—and therefore even if the meaning of "affiliate" were clear, and resort to legislative history unnecessary, to find that the statute does not address the circumstance of the foreign producer or exporter itself acting as the importer of record would result in an apparent absurdity.

With respect to the argument that Corus's standard provision protecting Corus "should its U.S. price provision decline over time," the Department disagrees and finds this agreement cannot be equated with a requirement that the unaffiliated purchaser pay antidumping duties. Therefore, the Department finds the record contains no evidence that duties were not absorbed. Because Corus Staal did not rebut the duty absorption presumption with evidence that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise, we have not changed our preliminarily finding that antidumping duties have been absorbed by Corus Staal on all U.S. sales made through its importer of record, namely Corus Staal.

Finally, with respect to Corus' definition of the word "determine," the Department agrees with Mittal Steel's argument that the Department depends upon respondents to provide information in making both dumping duty and duty absorption determinations. The Department sought information pertinent to both issues, and gave Corus opportunity to rebut the presumption of duty absorption. Corus failed to provide such evidence.

Warranty Expenses

Corus argues the Department erred in the preliminary results by replacing its reported customer-specific warranty expense rates with overall average warranty expense rates for subject hot-rolled steel merchandise in each market. Corus contends the Department provided no explanation for this determination in the preliminary results and seems to have assumed that the overall average warranty expense rates would result in a more accurate margin calculation.

Corus cites the Department's January 3, 2006, questionnaire at pages B-26 and C-30, which asks the respondent to report warranty costs on a model-specific basis, and if this is not practical, to express warranty costs on the most product specific basis possible. Corus contends it does not manufacture or sell hot-rolled steel on a product-specific basis and thus it cannot record warranty expenses on that basis. Citing its February 9, 2006, questionnaire response at A-75-76, Corus asserts it produces hot-rolled steel to customer specifications. As each customer's needs remain relatively constant over time, Corus maintains that customers tend to make repeated purchases of the same or similar specifications. Corus states it therefore computed and reported its home market and U.S. warranty expenses on a customer-specific basis by summing all of the credit notes issued to each U.S. or home market customer during the POR and dividing those totals by the quantity shipped to each customer. Corus asserts that since it manufactures subject hot-rolled steel to order according to customer specifications, its reported customer-specific rates are in fact model-specific. By using overall average warranty expense rates, Corus asserts the Department disregarded the most product-specific basis for calculating warranty expenses.

Corus claims the Department's decision not to use its reported customer-specific warranty expenses conflicts with case precedent, citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Korea, 67 FR 62124 (October 3, 2002) (Cold-Rolled Steel from Korea) and the accompanying Issues and Decision Memorandum at Comment 11 and Grain-Oriented Electrical Steel from Italy: Final Results of Antidumping Administrative Review, 66 FR 14887 (March 14, 2001) (GOES from Italy) and the accompanying Issues and Decision Memorandum at Comment 6. In GOES from Italy, Corus argues, the Department stated, "where the respondent does not record warranty expenses on a model-

specific basis in the normal course of business, the Department allows these expenses to be reported on a customer-specific basis." Corus Case Brief at 37, citing GOES from Italy and the accompanying Issues and Decision Memorandum at Comment 6.

Corus contends the Department has accepted Corus' customer-specific methodology for reporting warranty expenses in the original investigation and each subsequent administrative review. Corus argues the Department accepted its customer-specific warranty expense reporting in both the investigation and the first administrative review following verifications in which it found "no discrepancies" with respect to Corus' U.S. and home market warranty expenses. Corus asserts there have not been any material changes in fact in the instant review that would warrant a change in how its warranty expenses are treated. Without a change in material fact, Corus argues the law dictates that an agency cannot resolve an issue in a contrary manner, citing, among others, *Davila-Bardales*, 27 F.3d at 5 (quoting *Shaw's Supermarkets*, 884 F. 2d at 36); *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 418 (Ct. Int'l Trade 1993); and *Anshan Iron & Steel Co. Ltd. v. United States*, 2003 Ct. Int'l Trade Lexis 109, Slip Op. 2003-83 (2003) at *19-20 (citing *Shikoku Chems. Corp. v. United States*, 795 F. Supp. 417, 421-22 (Ct. Int'l Trade 1992) (Shikoku)).

In addition, Corus states it has used a customer-specific methodology for both the U.S. and home markets. Citing Cold-Rolled Steel from Korea and the accompanying Issues and Decision Memorandum at Comment 11, Corus holds the Department has found that consistency between markets lends support to accepting customer-specific warranty expenses, although such consistency is not the deciding factor.

In conclusion, Corus maintains it relied upon the Department's acceptance of its customer-specific warranty expenses in all prior segments of this proceeding and the Department

has given no explanation for its change in methodology nor has it shown that its explanation is in keeping with law or supported by record evidence. Thus, Corus urges the Department to use its reported customer-specific warranty expense rates for these final results.

U.S. Steel contends Corus has failed to show that its customer-specific warranty expenses are model-specific. In fact, U.S. Steel asserts, Corus' claim that its customer-specific warranty expenses are akin to model-specific rates is contradicted by its own sales data. U.S. Steel maintains the Department's use of average warranty rates in the U.S. and home markets is supported by record evidence and is in accordance with the Department's standard practice. Citing Corus' April 28, 2006, SQR at 55 and 71, U.S. Steel argues that Corus offered the same warranty terms to all home market customers and that warranty terms did not vary from customer to customer in the U.S. market. Where warranty terms do not differ significantly from customer to customer, U.S. Steel claims the Department's practice is to allocate total warranty expenses over total sales in each market. U.S. Steel Rebuttal Brief at 15, citing Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 71 FR 26333 (May 4, 2006) (Honey from Argentina) and the accompanying Issues and Decision Memorandum at Comment 1.

Mittal Steel argues the Department has a considerable amount of discretion when determining how to allocate warranty expenses, citing *NSK, Ltd. v. Koyo Seiko Co., Ltd.*, 190 F. 3d 1321, 1331 (Fed. Cir. 1999). Pursuant to section 351.401(g)(1) of the Department's regulations, Mittal Steel contends the Department may use allocated expenses when transaction-specific reporting is not feasible and the Department is satisfied that the allocation method does not cause inaccuracies or distortions. Since warranty expenses typically

cannot be reported on a transaction-specific basis, Mittal Steel claims it is necessary to use some method of allocation to account for these expenses. Mittal Steel maintains the Department has opted to apply an average warranty rate to all sales rather than rely on customer-specific warranty expenses, citing Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611 (October 4, 200 1) (Honey from Argentina Final Determination) and the accompanying Issues and Decision Memorandum at Comment 15. Mittal Steel contends the Department made that determination in Honey from Argentina Final Determination because it found there were no significant differences between product lines and warranty terms between customers. Mittal Steel Rebuttal Brief at 14-15, citing Honey from Argentina and the accompanying Issues and Decision Memorandum at Comment 1. Citing Corus' April 28, 2006, SQR at 55 and 71, Mittal Steel argues that Corus offers the same warranty terms to all customers in each market and therefore application of an average warranty expense rate to all sales in each market is appropriate.

Mittal Steel asserts that Corus' citations to Cold-Rolled Steel from Korea and GOES from Italy are inapposite. In those cases, Mittal Steel argues, the Department rejected challenges to its decision to use customer-specific warranty expenses since transaction-specific reporting was not feasible and no other alternative for measuring the expenses was presented. However, Mittal Steel claims, in the instant review there is an alternative method for allocating warranty expenses since Corus has provided an overall average warranty expense rate for both markets. Mittal Steel argues the Department has acted within its discretion to use the overall average warranty expense rates because these are less likely to result in inaccuracies and distortions.

Nucor argues that the Department asked Corus to report warranty expenses on a model-specific basis both in the

original questionnaire and in a supplemental questionnaire. However, Nucor asserts, Corus did not report model-specific warranty expenses and did not explain why it was unable to do so. Nucor maintains Corus has not provided any general ledgers that would support Corus' claim that warranty expenses are not recorded on a product level more specific than hot-rolled steel. Nucor contends that even if Corus' ledgers are not kept at this level, there is a mill certificate for each hot-rolled coil as is typical in the steel industry. Thus, Nucor claims, it is likely a warranty claim on a particular sale of subject merchandise could be traced back to the manufacturer and from there Corus could have allocated POR warranty expenses on a product-specific basis. Because Corus neglected to show why it cannot provide warranty expenses in the format requested by the Department, Nucor argues the Department is warranted in using adverse facts available.

Given the alternative of using a customer-specific methodology or an average rate, Nucor claims an average warranty expense rate is more appropriate in this case. Although the Department has accepted customer-specific warranty expenses in certain cases, such as in Cold-Rolled Steel from Korea and GOES from Italy, Nucor argues the Department has chosen to employ average rates over customer-specific rates in certain circumstances, such as in Honey from Argentina. Nucor contends an identical fact pattern exists in the instant review. Citing Corus' April 28, 2006, SQR at 55 and 71, Nucor argues that Corus offers the same warranty terms to all customers in each market. Moreover, Nucor claims, Corus was unable to provide copies of warranty agreements for each customer.

U.S. Steel, Mittal Steel, and Nucor maintain the Department's use of a different methodology from that used in prior segments of this proceeding is not without precedent. U.S. Steel and Nucor cite Honey from Argentina, in which the Department employed a market-wide warranty expense allo-

cation despite accepting the respondent's customer-specific warranty expenses in previous administrative reviews. Mittal Steel holds the Department is not required to follow its interpretation in prior proceedings if there are new arguments or facts upholding a different conclusion, citing *Hoogovens Staal BV v. United States*, 4 F.Supp.2d 1213, 1217 (CIT 1998). Referring to Shikoku, Mittal Steel asserts that while the Court found the Department lacked an adequate basis for changing its practice in Shikuko, Corus offers no support for its claim that it relied on the Department's prior methodology to its detriment. Mittal Steel contends the Department found Shikoku to be inapplicable for this same reason in Honey from Argentina Third Administrative Review. Mittal Rebuttal Brief at 16-17, citing Honey from Argentina.

Based on the foregoing, U.S. Steel, Mittal Steel and Nucor assert the Department properly used overall average warranty rates in the preliminary results and should continue to do so for the final results.

Department's Position:

The Department has determined that it correctly used the overall average warranty rates in the preliminary results and has not changed its position in these final results. In its questionnaires, the Department asked Corus to provide documentation showing how warranty terms differed by customer. In its reply, Corus stated it provided the same warranty terms to all home market customers and that warranty terms do not vary from customer to customer in the U.S. market. See Corus's April 28, 2006, supplemental response at 55 and 71. Therefore, as no significant differences exist between product lines and warranty terms between customers in the market at issue in this review are not distinguishable, the Department finds a market allocation methodology superior under these circumstances. See Honey from Argentina.

Moreover, with respect to the claim that the Department cannot change methodologies from proceeding to proceeding, the Department agrees with Mittal Steel that the Department is not required to follow its interpretation in prior proceedings if there are new arguments or facts supporting a different conclusion. See *Hoogovens Staal BV v. United States*, 4 F.Supp.2d 1213, 1217 (Ct. Int'l Trade 1998).

The Department is authorized to exercise its discretion in the treatment of warranty expenses, provided the interpretation of the statute is reasonable. *NSK Ltd. v. United States*, 190 F.3d 1321, 1331 (Fed. Cir. 1999) (citing *Zenith Elecs Corp. v. United States*, 988 F.2d 1573, 1583-84 (Fed. Cir. 1993)). Accordingly, the Department may formulate and apply improved methodologies based on the facts of a review. See Honey from Argentina.

As stated in Honey from Argentina, the Department recognizes that by their nature warranty expenses are unknown and unforeseeable at the time of sale. As such, in evaluating these types of expenses (i.e., expenses that are inherently unpredictable at the time of sale), the Department tries to account for warranty expenses on a model-specific basis. If Corus had been able to show different warranty terms to different customers, a customer-specific warranty rate may have been acceptable. However, in this case, Corus was unable to show either a basis for either a model-specific warranty or a customer-specific warranty. Therefore, the Department, in line with similar recent cases, is justified in using a market-specific allocation as reported by Corus in its April 28, 2006, response at 55 and 71.

The Department disagrees with Nucor that the Department would be warranted in using adverse facts available because Corus neglected to show why it cannot provide warranty expenses in the format requested by the Department. Corus has claimed it does not sell different models or types of subject hot-rolled merchandise, and there is nothing on the

record of this proceeding that allows the Department to conclude otherwise. Therefore, we find that an adverse application of facts available is not warranted in this specific situation.

8. Clerical Errors

First, Mittal Steel alleges the Department's margin calculation program contains a clerical error that results in the incorrect matching of U.S. sales to normal values. Specifically, Mittal Steel claims the program erroneously compares U.S. control numbers (CONNUMU) to comparison market product codes (PRODCODH) in trying to find identical matches. Mittal Steel argues the Department can fix this error by including the variable comparison market control number (CONNUMH) in the weighted average normal value (NV) database output for the comparison market program and adjusting the margin program to use the CONNUMH rather than PRODCODH.

Corus does not rebut Mittal Steel's argument.

Second, Corus argues in calculating the CEP profit rate, the Department inadvertently neglected to include U.S. indirect selling expenses (ISEs) for EP transactions. Specifically, Corus contends the Department did not incorporate the field INDIRS1U, which includes the ISEs that Corus incurred in the United States, in the CEP profit rate calculation. Corus asserts this mistake artificially increased Corus' CEP profit in the preliminary results, and thus urges the Department to correct this error for the final results.

U.S. Steel, Mittal Steel, and Nucor did not comment on the clerical error.

Department's Position:

We agree that both comments are clerical errors and have corrected both. However, with respect to the first error, we have used use PRODCODH/U as Corus used these fields to

report the product characteristics contained in the Department's questionnaire. With respect to the second error, the programming language suggested by Corus would result in the DINDIRSU being multiplied by INDIRS1U. This would not achieve the desired correction. Instead, the Department has crafted programming language to effect the desired change. See our Final Results calculation memorandum, dated May 15, 2007, for the revised programming.

Agree _____ Disagree _____

_____

David M. Spooner
Assistant Secretary
for Import Administration

_____
Date